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In The

Supreme Court of the United States

October Term, 1994

STATE OF ALASKA,

Petitioner,

vs.

BRUCE E. BABBITT, Secretary of the Interior; the UNITED STATES OF AMERICA; ELIZABETH SIMMONDS on behalf of LEVI SIMMONDS, a minor; and DIANE MAY WILLIAMS KOCHENDORFER,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In rendering administrative decisions for the issuance of a Native allotment, is the Secretary of the Interior immune under the Quiet Title Act from an action for judicial review, where he cancels a highway grant issued pursuant to 23 U.S.C. § 317, and, in doing so, disregards the congressional limits placed on lands available for allotment under the Alaska Native Allotment Act, 43 U.S.C. § 270-1.

In determining the applicability of the Quiet Title Act's Indian land exception to the waiver of sovereign immunity, must the court examine whether the land at issue was trust or restricted Indian land at the time Alaska's conflicting interest in the land arose.

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Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

The State of Alaska requests that a Writ of Certiorari issue to review the final judgment entered in this proceeding by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The judgment of the Ninth Circuit is unpublished. App. 1a. The judgment of the district court is also unpublished. App. 9a. The decision of the Interior Board

of Land Appeals is reported as *State of Alaska*, 125 IBLA 21 (1992), App. 13a.

JURISDICTION

The Ninth Circuit entered its judgment on November 7, 1994. App. 1a. It denied Alaska's petition for rehearing and rejected Alaska's suggestion for rehearing en banc on December 19, 1994. App. 27a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

23 U.S.C. § 317

28 U.S.C. § 2409a(a)

43 U.S.C. §§ 270-1, 270-3

43 U.S.C. § 1617(a)

43 U.S.C. § 1634(a)(1)

STATEMENT

This appeal arises out of an action brought by the State of Alaska for judicial review of the decision of the Interior Board of Land Appeals (IBLA) in *State of Alaska*, 125 IBLA 21 (1992), App. 13a. The IBLA decision affirmed the revocation by the Bureau of Land Management (BLM) of a highway right-of-way grant for a material site issued to the Alaska Department of Highways by the BLM in

1966. The jurisdiction of the district court was predicated on 28 U.S.C. §§ 1331, 1346(a)(2), 1353, 1361, 43 U.S.C. §§ 1632(a), 1634, and 5 U.S.C. § 701.

Right-of-way grant A-063173 was issued to the State of Alaska by the BLM on April 28, 1966. App. 32a. The material site was used for the construction of the Edgerton Highway and continues to be used for maintenance of that highway. App. 40a. The BLM issued the material source grant pursuant to 23 U.S.C. § 317. The grant provides that:

> . . . a right-of-way . . . is hereby granted for the public lands involved,[1] subject to the following terms and conditions:
>
> 1. All valid rights existing on the date of the grant. . . .

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[1] For the purpose of this grant, public domain lands include those reserved or withdrawn for specific purposes, entered, selected, occupied, and/or settled, and leased.

App. 33a. Three years prior to the issuance of the grant the Regional Solicitor issued an opinion (dated March 22, 1963) advising BLM that it had the authority to issue highway rights-of-way even though the land was subject to an allotment application. App. 28a. This opinion reflected the state of the law until 1987, as will be explained below.

Alaska developed the material site as required by the grant. The BLM issued a decision confirming Alaska's

compliance with the terms of the grant on October 12, 1978. App. 38a.

Congress enacted the Alaska Native Claims Settlement Act (ANCSA) in 1971. 43 U.S.C. § 1601 *et seq.* ANCSA repealed the Native Allotment Act effective December 18, 1971 with a savings clause for allotment applications pending before the Department of the Interior on that date. 43 U.S.C. § 1617(a), App. 91a.

On March 27, 1972 the BIA filed Lucy Williams' allotment application (AA-6000, Parcel B) with the BLM. App. 35a. BLM did not act on the Williams allotment application until 1985. App. 21a.

In March 1985 the IBLA issued a decision in an unrelated case, *Golden Valley Electric Association*, 85 IBLA 363 (1985) ("*GVEA*"). App. 43a. In *GVEA* the IBLA held that an allotment must be made subject to a right-of-way grant notwithstanding an earlier claimed occupancy by the applicant. *Id.* at 365, App. 47a-48a.

On May 14, 1985, just two months after issuance of the *GVEA* decision, the BLM issued a decision confirming legislative approval of the Williams allotment application under Section 905(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(1). App. 21a. This statute provided that legislatively approved allotments were subject to valid existing rights.[1] The State's material site grant was noted in

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[1] The term "legislative approval" refers to the provision of ANILCA wherein Congress declared all Native allotment applications pending before the Department of the Interior on December 18, 1971 to be approved subject to valid existing

the BLM decision but no action was taken against it. App. 24a.

Between 1985 and 1990, the IBLA issued two decisions which would ultimately be used as precedent and applied against the material source at issue in this case. Both decisions were unrelated to the Williams allotment. The first decision, issued in 1987, was *Golden Valley Electric Association (On Reconsideration)*, 98 IBLA 203 (1987), App. 49a. In that case, the Board held that a right-of-way would be voided if there had been Native use and occupancy of the land prior to issuance of the right-of-way, even though an allotment application was not filed until after the right-of-way was granted. *Id.* at 205. The Board expressly recognized that its decision constituted "a shift in BLM's policy regarding the issuance of allotment certificates subject to rights-of-way." *Id.* at 207 n.1, App. 58a.

The second intervening decision, issued in 1989, was *State of Alaska, Golden Valley Electric Association*, 110 IBLA 224 (1989) ("*State, GVEA*"), App. 60a. In that case, the Board held that legislative approval of an allotment under Section 905(a) of ANILCA precluded inquiry into the facts and circumstances of an allottee's use and occupancy even though the alleged use and occupancy was the reason for invalidating the right-of-way and the allotment application was not filed until after the grant was

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rights, thus obviating the need to adjudicate use and occupancy as required under BLM regulations. 43 U.S.C. § 1634(a)(1). App. 91a. *See Olympic v. United States*, 615 F. Supp. 990, 994-95 (D.C. Alaska 1985).

issued. 110 IBLA at 228.[2] Under this decision, Alaska was barred from disputing an allottee's allegation that his use and occupancy preceded the grant. An evidentiary hearing could not be held on this issue.

On January 19, 1990 BLM issued its decision voiding the material source at issue in this case. App. 17a. The record does not disclose why BLM initiated action against the grant, but it was apparently based on the IBLA decisions described above. The BLM decision was based upon Lucy Williams' allegation of use and occupancy prior to issuance of Alaska's right-of-way. BLM did not notify Alaska that it was reviewing the grant. BLM did not afford Alaska an opportunity to contest Ms. Williams' alleged potentially exclusive use and occupancy of the land which formed the basis for the voidance of the State's grant. Ms. Williams never protested Alaska's development of the material source or the extraction of material from it. App. 40a.

Alaska appealed the BLM decision to the IBLA. The State contended that, as a matter of law, the allotment must be made subject to the right-of-way grant and, alternatively, that the State was entitled to an evidentiary hearing on the factual allegations used to invalidate the grant. As part of the IBLA appeal, Alaska submitted an affidavit establishing the State's use of the material source since 1966, the State's continuing need for the source, and the allottee's failure to object to the State's

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[2] The Ninth Circuit in *State of Alaska v. Babbitt [Albert]*, 38 F.3d 1068 (9th Cir. 1994) recently affirmed that the sovereign immunity of the United States precluded an action for judicial review of this decision.

development of the source and use of the material. App. 39a. The IBLA affirmed the voidance of Alaska's grant on December 21, 1992. *State of Alaska*, 125 IBLA 21 (1992), App. 13a.

Alaska filed a complaint for judicial review of the IBLA decision. The federal defendants claimed that the Quiet Title Act's (QTA) "trust or restricted Indian land" exception to the waiver of sovereign immunity barred Alaska's action. 28 U.S.C. § 2409a(a), App. 89a. The State argued that the Secretary's action in approving the Williams allotment was *ultra vires*. The Secretary acted in contravention of the statutory limitations placed upon his delegated power by Congress in the Alaska Native Allotment Act. 43 U.S.C. § 270-1, App. 89a. The district court ruled that sovereign immunity barred review of the Secretary's decision and dismissed the State's complaint.

On appeal, the Ninth Circuit affirmed the dismissal of Alaska's action.[3] The order affirming the dismissal stated that the decision in *State of Alaska v. Babbitt [Albert]*, 38 F.3d 1068 (9th Cir. 1994) (*"Albert"*), decided just one month prior, could not be distinguished from the *Williams* case and ruled that the government was immune from suit. App. 2a.

REASONS FOR GRANTING THE PETITION

In this case Alaska alleged that sovereign immunity did not bar its action for judicial review because the

[3] Hereinafter the Ninth Circuit's decision in this case is referred to as *"Williams"*.

Secretary acted outside the scope of his delegated powers by approving a Native allotment on lands that were unavailable for allotment by statute at the time Lucy Williams filed her allotment application. The Ninth Circuit failed to consider this argument when it ruled that the *Williams* case was indistinguishable from *Albert*.

Although Congress delegated to the Secretary the authority to issue Native allotments, the issue of whether the Secretary acts *ultra vires* where he ignores the congressional limits placed upon his delegated power is an important federal question which has not, but should be, settled by this Court. This issue affects other cases pending in the federal courts and before the Interior Board of Land Appeals where parcels claimed in Native allotment applications are traversed by public roads or contain State material sites.[4]

The will of Congress as expressed in the Alaska Native Allotment Act is frustrated where the Secretary approves an allotment on lands specifically deemed by Congress to be unavailable for allotment. If the Ninth Circuit's decision in this case is permitted to stand, the Secretary's authority will be broadened to include the authority to interpret out of the law the limitations Congress placed on his delegated power, thus usurping the authority of Congress.

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[4] *See State v. Babbitt [Foster]*, 9th Cir. No. 94-35677; *State v. Babbitt [Bryant]*, District Court No. A94-301 CV (HRH); *Silas v. Babbitt*, District Court No. A93-035 CV (JKS); *Appeal of State of Alaska [Irene Johnson]*, IBLA No. 91-89; *Appeal of State of Alaska [Jack Craig]*, IBLA No. 91-107; *Appeal of State of Alaska [Joe Goodlataw]*, IBLA No. 92-566.

There is a conflict between the Ninth and Tenth Circuits as to the relevant time period to be examined when deciding whether Indian trust title deprives courts of the authority to review agency decisions concerning conflicting rights in land. In *Albert* and *Williams*, the Ninth Circuit examined the ***present*** status of the land to determine whether the government had a "colorable claim" that the land was trust or restricted property. *Albert*, 38 F.3d at 1075-76; *Williams*, App. 2a. In *Foust v. Lujan*, 942 F.2d 712, 715 (10th Cir. 1991)[5], an action for judicial review of an IBLA decision affecting Indian land title, the Tenth Circuit held that the relevant time period to be examined is the time at which the interest presently conflicting with Indian title ***first arose***. This Court should grant certiorari to resolve this conflict.

I. Sovereign immunity does not shield the Secretary from judicial review of actions taken by him that are outside the scope of his delegated powers.

The modern expression of the *ultra vires* exception is found in this Court's decision in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). The Court stated that:

> [W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do

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[5] *cert. denied sub nom, Northern Arapaho and Shoshone Indian Tribes of the Wind River Reservation v. Foust*, ___ U.S. ___, 112 S.Ct. 1668 (1992).

> or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief. It is important to note that in such cases the relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power.

Id. at 689-90. In *Larson* there was "no allegation of any statutory limitation" on the government agent's powers as a sales agent. *Id.* at 703. Therefore, the *ultra vires* exception did not apply. *Id.*

The Court applied the holding in *Larson* to a land title dispute in *Malone v. Bowdoin*, 369 U.S. 643 (1962). The Court in *Malone* understood the *Larson* decision to have "cut[] through the tangle of previous decisions" concerning the immunity of federal officers from suit, stating that, under *Larson*:

> [t]he action of a federal officer affecting property claimed by a plaintiff can be made the basis of a suit for specific relief against the officer as an individual only if the officer's action is 'not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.'

Id. at 647, quoting *Larson*, 337 U.S. at 702. The Court in *Dugan v. Rank*, 372 U.S. 623 (1963) succinctly described the *ultra vires* exception as including an

> (1) action by officers beyond the scope of their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void.

Id. at 621-22. In *Dugan* the Court found the Secretary immune from an action challenging his partial seizure of water rights, because "[t]he power to seize which was granted here had no limitation placed upon it by Congress. . . . " *Id.* at 622.

Unlike the statute in *Dugan*, the Alaska Native Allotment Act limits the type of public land available for allotment to Alaska Natives. It is this congressional restriction on the Secretary's delegated power that the Secretary ignored when he confirmed the approval of the Williams allotment application. His cancellation of Alaska's material site based on that confirmation was entirely outside the scope of his delegated powers.

Congress granted a limited delegation of power to the Secretary of the Interior under the Allotment Act. Under the Act, the Secretary was granted discretion "to allot not to exceed one hundred and sixty acres of vacant, **unappropriated**, and unreserved **nonmineral** land in the district of Alaska to any Indian, Aleut or Eskimo." 43 U.S.C. § 270-1[6] (emphasis added), App. 89a. The land within the State's material source was appropriated mineral land when Ms. Williams filed her allotment application, as Alaska demonstrates below. While the Allotment Act clearly grants to the Secretary the discretion to grant allotments "under such rules as he may prescribe," there is nothing in the Act that grants to the Secretary the authority to formulate rules that permit allotments on

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[6] Repealed with savings provision, 43 U.S.C. § 1617(a), App. 91a.

lands expressly excluded from the Allotment Act by Congress.

A. The material source was "appropriated" by the United States prior to the filing of the Williams application.

As stated above, Alaska received its material source grant under 23 U.S.C. § 317, App. 88a. That statute makes available to the States "the **lands or interests in lands** owned by the United States" that are reasonably needed for the construction and maintenance of highways. 23 U.S.C. § 317(a) (emphasis added). Under 23 U.S.C. § 317(b) the land and materials necessary for highway construction are "**appropriated and transferred** to the State highway department." (Emphasis added.) The interest so transferred remains permanently vested in the State until "the need for any such lands or materials for such purposes shall no longer exist," at which time they "immediately revert" to the United States. 23 U.S.C. § 317(c).

The terms of the material site grant are consistent with the statute. The grant recites that it is a "right-of-way . . . for the public lands involved. . . . " App. 33a. The term "public lands" is defined in the grant as follows:

> For the purposes of this grant, public domain lands include those reserved or withdrawn for specific purposes, entered, selected, occupied and/or settled, and leased.

App. 33a. This grant term expressly provides that the grant is effective notwithstanding occupancy of the land.

The State's grant also provides that it is subject to "[a]ll valid rights **existing on the date** of the grant." (Emphasis added.) App. 33a. However, this term of the grant does not affect Alaska's interest vis-à-vis Ms. Williams because Alaska's grant was issued five years before Ms. Williams filed her allotment application. Ms. Williams' mere use and occupancy of the land in 1966 does not shield her from disposal actions taken by the United States as the paramount title holder. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 285 (1955) ("Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States. . . . ").

In *State of Alaska v. 13.90 Acres of Land*, 625 F. Supp. 1315 (D. Alaska 1985) the court agreed that:

> [S]o long as a native's rights under the Allotment Act are inchoate (i.e. prior to application and vesting of rights) Congress, or an executive agency with Congressional authority, can withdraw the lands from entry and rededicate them to another use.

Id. at 1320 and n.7. Prior to the filing of an allotment application Ms. Williams' alleged use and occupancy of the land in 1966 afforded her no vested property right in the land. *13.90 Acres, id.; United States v. Flynn*, 53 IBLA 208, 234 (1981). Therefore, the State's grant was not subject to Ms. Williams' allotment because her rights in the land were not vested in 1966 when the State received its grant.

The United States had the authority under 23 U.S.C. § 317(b) to make the appropriation of the material source subject to any condition it chose to specify. However, the

United States disposed of this land, not only without regard to prior occupancy or settlement of any kind, but in spite of any occupancy or settlement which may have been in conflict with the grant. The issuance in 1966 of Alaska's material site grant by the BLM constituted a disposal of public lands to the State that was unaffected by Lucy Williams' prior occupancy. Therefore, when Lucy Williams filed her allotment application in 1971, the land encompassed within the Edgerton Highway material source had already been appropriated to Alaska.

B. The material source was "mineral land" at the time of the Williams application.

At the time Lucy Williams filed her allotment application in 1971, the land within Alaska's grant had been developed as a material source and had thus been proven to be mineral in character, as that term was then defined. App. 40a. Lands valuable for gravel were considered to be "mineral lands" until the passage of ANILCA in 1980. *Ahtna, Inc.*, 100 IBLA 7, 17 (1987). An allotment could not be perfected in the material source because Alaska's grant preceded this statutory change of definition *and* preceded the filing of the allotment application.

II. The Ninth Circuit failed to examine the status of the land at the time Alaska received its grant in 1966 in determining whether the QTA's Indian land exception precluded judicial review.

As stated above, the Ninth Circuit's decision in *Alberi* examined the present status of the land to determine whether the government had a "colorable claim" that the

land was trust or restricted property. *Albert*, 38 F.3d at 1075-76. The Ninth Circuit applied the *Albert* decision to deny review of the Secretary's decision in *Williams*. App. 2a. This approach conflicts with the approach taken by the Tenth Circuit, where the status of the land is examined at the time the interest which now conflicts with Native title was created. *Foust*, 942 F.2d at 715. The Ninth Circuit should have applied the rationale of *Foust* and examined the status of the land as of the date Alaska received its right-of-way grant in 1966.

In *Foust*, the Tenth Circuit ruled that the Secretary was not precluded from correcting a patent where to do so would require the conveyance of Indian land to the patentee. The court held:

> We agree that lands now held by the United States in trust for Indians are not public lands. *See* 43 U.S.C. § 1702(e). The relevant inquiry, however, is whether the lands in question were public lands **at the time the patent was issued.** The lot in question here . . . was owned by the United States, administered by the Secretary, and not held in trust for the Indians in 1936 [when the patent was issued], and it therefore was public land under the statutory definition. *See id.*
>
> We believe the Secretary's fiduciary duty to the Indians does not prevent him from correcting a patent to land that **was public at the time the patent was issued and the alleged mistake made.**

942 F.2d at 715 (emphasis added).

By looking at the status of the land at the time the interest conflicting with Indian title was created, the approach taken by *Foust* avoids the violence the *Albert* decision inflicts on Alaska's good faith reliance on the express terms of its grant, and the BLM's pre-1987 policy of making allotments subject to rights-of-way. The analytical approach of *Foust* prevents the federal government's bootstrapping argument in *Williams* that the land is Indian land simply because the Secretary says so. It precludes the Secretary from immunizing himself from judicial review based on Indian title by use of the very decision that purports to establish Indian title. Further, the approach in *Foust* is consistent with the legislative history of the Indian land exception to the QTA's waiver of sovereign immunity. The purpose of the exception is to protect trust or restricted Indian land. *Albert*, 38 F.3d at 1072-73 n.4. Where the State's interest is created by the federal government before the land became Indian land, the purpose of the QTA's exception is not frustrated by allowing judicial review of a decision cancelling the State's interest.

III. The Ninth Circuit wrongly applied its decision in *State of Alaska v. Babbitt [Albert]* to the facts in Williams.

Just prior to the date scheduled for oral argument in this case, the Ninth Circuit decided the case of *State of Alaska v. Babbitt [Albert]*, 38 F.3d 1068 (9th Cir. 1994). In *Albert*, the court held that the United States was immune from an action for judicial review of a secretarial decision approving Albert's Native allotment and voiding a highway grant to the State. The court ruled that the QTA did

not waive the immunity of the United States where title to "trust or restricted Indian lands" was at issue. *Id.* at 1072. The QTA precluded the State from challenging the secretarial decision approving the allotment because the government had a "colorable claim" that the land at issue was trust or restricted Indian land. *Id.* at 1076.

The court also ruled that a "Native occupant's *filing* of a timely application under the 1906 Allotment Act vests his or her preference rights to the land." *Id.* at 1073 (emphasis in original). Thus, the Ninth Circuit apparently agrees that mere occupancy of federal lands affords the Native no rights in the land as against the plenary disposal power of the United States until an application is filed and equitable title vests.

The court in *Albert* discussed the *ultra vires* exception to sovereign immunity in the context of the State's argument that the IBLA had wrongly decided certain legal issues. *Id.* at 1076. The court affirmed the continuing vitality of the *ultra vires* exception to the sovereign immunity bar. *Id.* However, the Ninth Circuit found:

> The State has not alleged that the Secretary acted unconstitutionally, and there is absolutely no indication that the IBLA acted outside its statutory authority in making its determinations. . . .

Id.

By applying the *Albert* decision in wholesale fashion to the *Williams* case, the Ninth Circuit failed to take into account Alaska's arguments in *Williams* that the Secretary acted *ultra vires* (1) by approving a Native allotment on lands appropriated prior to the filing of the Native's

application for an allotment, and (2) by approving an allotment on proven mineral lands as that term was then defined. The decision in *Albert* does not address either of these points. Rather, the court in *Albert* decided that the Secretary had the authority to adjudicate Native allotments and the authority to cancel rights-of-way and thus did not act *ultra vires*. *Albert*, 38 F.3d at 1076 and n.7.

Because the Ninth Circuit elected not to issue a decision in *Williams*, it is difficult to ascertain the reasoning behind the court's finding that *Albert* and *Williams* were indistinguishable. However, it appears that the Ninth Circuit either believed that the State in *Williams* was merely challenging an incorrect secretarial decision, or that the *ultra vires* exception applies only when the Secretary acts in an area of law where he has no authority to act whatsoever.

Alaska does not dispute that the Secretary is generally authorized to issue allotments to Alaska Natives under the Alaska Native Allotment Act. However, this case is not one where the Secretary merely acted erroneously in rendering a decision as to a Native's compliance with occupancy requirements or a Native's alleged open and notorious use of public land. In this case, the Secretary approved an allotment on occupied, appropriated, mineral land where the Allotment Act plainly made such lands unavailable for allotment. By approving the allotment, the Secretary acted entirely outside the scope of his delegated power.

Nothing in *Larson* and its progeny supports the view that the Secretary is free to ignore, without fear of judicial review, the limitations Congress placed on his delegated

powers. In *Larson*, this Court stated that the *ultra vires* exception applied to those actions taken pursuant to statutory authorization but which were accomplished "in a way which the sovereign has forbidden." *Larson*, 337 U.S. at 689. In this case, Congress authorized Native allotments only on unappropriated, nonmineral lands in Alaska. The confirmation of an allotment on previously appropriated mineral lands is manifestly beyond the limitations placed on the Secretary's power.

The actions of a government officer are not the actions of the government "when the officer's powers are limited by statute and the actions are beyond those limitations." *Martinez v. Marshall*, 573 F.2d 555, 560 (9th Cir. 1977). "*Ultra vires* claims rest on the official's lack of delegated power." *U.S. v. Yakima Tribal Court*, 806 F.2d 853, 860 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987). Where the Secretary makes available for allotment land that Congress declared unavailable, and where he has acted so inconsistently with the Allotment Act that he violates specific limiting provisions of the Act in granting an allotment, he should not receive the protection of sovereign immunity.

The Secretary has no more authority to ignore the limits placed on the type of land he can allot than he can ignore the limits on the amount of land he can allot. It can not be credibly argued that the Secretary could have issued an allotment for five hundred acres to Ms. Williams and be shielded from judicial review of that decision simply because he was given authority to issue an allotment for one hundred and sixty acres. Yet, under the Ninth Circuit's decision in *Williams*, the Secretary would be immune from an action for judicial review of the

issuance of a five hundred acre allotment simply because Congress gave the Secretary the power to approve Native allotments. However, "Congress did not intend to give unfettered discretion to the Secretary" under the Allotment Act. *Pence v. Kleppe*, 529 F.2d 135, 140 (9th Cir. 1976).

It is not enough to answer a claim of *ultra vires* conduct with the argument that the Secretary had "general authority" to issue allotments and therefore has authority to make erroneous decisions. There is likely no case where the Secretary's *ultra vires* actions could not be characterized as "an erroneous decision." That characterization of the Secretary's action begs the question of whether Congress placed limits on the power delegated to the Secretary and fails to address the outer limits of that delegated power. Where a substantive allegation of *ultra vires* conduct is made, the courts must look beyond the mere existence of some statutory authority and engage in reasoned analysis of the extent of power delegated by the statute.

In *State of Washington v. Udall*, 417 F.2d 1310 (9th Cir. 1969), the Ninth Circuit quoted with approval the observation of Professor Byse:

> 'The vice of *Larson* and its progeny is that they permit – perhaps even encourage – courts to shirk the hard task of determining the limits of official power. It is perfectly possible for a court to hold that an official has authority to make erroneous as well as correct determinations. Such a holding, of course, should rest on a reasoned determination that Congress intended to confer so broad a discretion.'

Id. at 1316 n.9. No violence is done to the concept of sovereign immunity by subjecting federal officials to a judicial examination of the express limitations placed on their delegated powers by the Congress and determining whether those limits have been exceeded. In fact, the doctrine of the separation of powers would appear to demand such an inquiry. The severely limited application of the *ultra vires* exception apparently adopted by the Ninth Circuit does violence to the balance of powers between Congress and the Executive. If the Congress places clear and unequivocal limits on a federal official's power, the federal official should not be shielded by sovereign immunity for actions taken that plainly exceed those limits. Such actions are "individual and not sovereign actions." *Larson*, 337 U.S. at 689.

In *Williams*, the Ninth Circuit failed to engage in any analysis of the Secretary's limited powers.[7] There can be no doubt that the Secretary's delegated power to approve a Native allotment is limited to allotment applications encompassing "vacant, unappropriated, and unreserved nonmineral land" in Alaska. 43 U.S.C. § 270-1, App. 89a. The essence of Alaska's claim in this case is that the Secretary exceeded this limited power by approving Williams' allotment on appropriated, mineral land and then by using that approval as a pretext for canceling the

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[7] In fact, the court believed that it was precluded from doing so because the allotment was legislatively approved under ANILCA. App. 2a at n.1. Alaska demonstrates in Argument IV below, that legislative approval of allotments under ANILCA does not preclude the court from analyzing the land's status at the time the allotment application was filed for the purpose of determining the court's subject matter jurisdiction.

State's right-of-way. If the Secretary can not be said to act *ultra vires* when he disregards the limits placed on his delegated power, then the *ultra vires* exception affords those with interests in federal lands no protection against an abuse of power. Where, as here, the Secretary takes action that directly contradicts the very limits placed by Congress on his delegated power, he acts *ultra vires* and should be held to answer before the courts for the violation of his delegated power.

IV. The Ninth Circuit incorrectly ruled that legislative approval of the allotment under ANILCA precluded review of Williams' entitlement to an allotment.

Relying on *Albert*, 38 F.3d 1068, the Ninth Circuit refused to review "Williams' entitlement to the allotment" because "legislative approval precludes any further inquiry into that question." App. 2a at n.1. However, legislative approval of Native allotment applications does not preclude review of the statutory availability of the applied-for lands under the Allotment Act. Prior to the passage of ANILCA, there were two aspects to an allotment adjudication. First, the Secretary had to determine whether the land applied for was "vacant, unappropriated, and unreserved nonmineral land" in Alaska. 43 U.S.C. § 270-1, App. 89a. If the land were legally available for allotment at the time the application was filed, then the Secretary had to additionally adjudicate whether the applicant actually used and occupied the parcel claimed in the manner required by statute and BLM regulations. 43 U.S.C. § 270-3, App. 90a; *Olympic*, 615 F. Supp. at 994.

The purpose of Section 905(a)(1) of ANILCA is to promote allotment finality. *Olympic, id.* Congress achieved this goal by dispensing with the time-consuming adjudication of an applicant's qualifying use and occupancy of the applied-for lands. Thus, the legislative approval of allotment applications was addressed to the issue of use and occupancy, not the legal availability of the land for allotment. There is nothing in the legislative history of Section 905(a)(1) of ANILCA that suggests that Congress intended to automatically approve an allotment application for lands not legally available for allotment under Section 270-1 of the Allotment Act.

This interpretation of ANILCA Section 905(a)(1) is supported by the language of the statute itself. Section 905(a)(1) renders legislatively approved allotments "subject to valid existing rights." 43 U.S.C. § 1634(a)(1), App. 91a. This language strongly suggests that the legal status of the applied-for lands must be reviewed prior to issuance of an allotment. Therefore, ANILCA Section 905(a)(1) still requires the Secretary to allot lands in accordance with the Allotment Act's limitation on the **type** of land available for allotment.

In ruling that legislative approval of an allotment precludes inquiry into the Native's entitlement to an allotment, the *Albert* decision relied upon the IBLA's decision in *State, GVEA*, 110 IBLA 224, App. 60a. The *Albert* decision designates this Board decision as "*Alaska II.*" 38 F.3d at 1072. However, shortly after the *Albert* decision was issued, the IBLA ruled that an allottee's preference right did not relate back to the date of initiation of use

and occupancy as against a right-of-way granted on mineral land. *State of Alaska Dept. of Transportation & Pub. Fac. [Mary Sanford]*, 131 IBLA 121, 127-28 (1994),[8] App. 74a.

The ruling in *Sanford* was based on the fact that the Allotment Act did not authorize allotments on mineral lands. *Id.* at 127, App. 85a. The Board also held that legislative approval of the allotment did not preclude an examination of the land's status as of the date the application was filed. Distinguishing a material source right-of-way from rights-of-way issued for highway and power transmission construction, the IBLA held:

> In [*Ahtna*] we noted that the Alaska Native Allotment Act expressly limited Native allotments to "nonmineral" land.
>
> . . .
>
> Accordingly, we find that the allotment applicant's preference right to an allotment cannot as a matter of law relate back to the initiation of use and occupancy with respect to the mineral land located within the State's mineral material site right-of-way. With respect to statutory [legislative] approval of the allotment pursuant to section 905(a)(1) of ANILCA, such approval is subject to "valid existing rights." While section 905(a)(3) of ANILCA defined "nonmineral" lands to include lands valuable for gravel, this provision did not retroactively invalidate the material site right-of-way. Consequently, there is no basis for finding that the

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[8] Alaska advised the Ninth Circuit of the *Sanford* decision prior to the court's November 7, 1994 ruling in *Williams*. App. 42a.

> State material site right-of-way issued in 1966 was preempted and is null and void.

Id. at 127-28 (citations and footnote omitted), App. 85a-86a. The Board's reasoning in *Sanford* also logically applies to lands that were appropriated prior to the filing of an allotment application. Therefore, the holding in *Albert* is not applicable to the facts in *Williams*.

The *Sanford* decision is consistent with the holding in *Foust*, 942 F.2d at 715. In determining whether the trust status of Indian land bars judicial review of an agency decision, the court in *Foust* held that the relevant inquiry is the status of the land at the time the claimant's interest in the land was first created. In light of the *Sanford* decision, the Ninth Circuit should have considered whether Alaska's material source grant was a valid existing right to which the allotment should be made subject pursuant to ANILCA Section 905(a)(1). The *Williams* decision should be reversed in light of this recent development in the agency's decisional law.

The IBLA's decision in *Sanford* recognizes the limits placed on the Secretary's delegated power in the Alaska Native Allotment Act: The Secretary acts without authority when he cancels a right-of-way based on a Native's claim to land that, as a matter of law, was not available for allotment to the Native in the first instance. This Court should likewise apply the limits placed by Congress on the Secretary's delegated power and declare the Secretary's action in confirming the Williams allotment

ultra vires to the extent that the allotment conflicts with Alaska's material source.

CONCLUSION

Alaska's petition should be granted.

Respectfully submitted,

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APPENDIX

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF ALASKA, Plaintiff-Appellant, v. BRUCE BABBITT, Secretary of the Interior; UNITED STATES OF AMERICA; ELIZABETH SIMMONDS, on behalf of Levi Simmonds, a minor; DIANE MAY WILLIAMS KOCHENDORFER, Defendants-Appellees.	) No. 94-35130) D.C. No. CV-93-00016-JWS) ORDER) (Filed Nov. 7, 1994)

Appeal from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding

Submitted* October 31, 1994
Seattle, Washington

Before: WRIGHT, BEEZER and FERNANDEZ, Circuit Judges.

This court requested the parties to submit supplemental briefs regarding the effect on this appeal of this court's decision in *Alaska v. Babbitt (Albert Allotment)*, No. 93-35684, slip op. 12437 (9th Cir. Oct. 11, 1994).

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*The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); Ninth Circuit Rule 34-4.

The court has considered the briefs, record and supplemental briefs and concludes that this appeal cannot be distinguished from the decision in *Alaska v. Babbitt (Albert Allotment)*, No. 93-35684, slip op. 12437 (9th Cir. Oct. 11, 1994). The government is immune from suit under the Quiet Title Act.[1]

AFFIRMED.

---

[1] We have not overlooked Alaska's assertions about Williams' entitlement to the allotment. But legislative approval precludes any further inquiry into that question. *Alaska v. Babbitt (Albert Allotment)*, No. 93-35684, slip op. 12437, 12452 (9th Cir. Oct. 11, 1994). And Alaska's assertions do not make the title claim of the United States less than colorable.

UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

STATE OF ALASKA, Plaintiff, vs. BRUCE E. BABBITT, SECRETARY OF THE INTERIOR; the UNITED STATES OF AMERICA; ELIZABETH SIMMONDS, on behalf of LEVI SIMMONDS, a minor; and DIANE MAY WILLIAMS KOCHENDORFER, Defendants.	Case No. F93-016 CIV ORDER FROM CHAMBERS (Filed Nov. 23, 1993)

The State of Alaska filed a complaint which asks this court to review a decision by the Interior Board of Land Appeals, 125 IBLA 21 (1992), found in the administrative record at pages 528-C – 528-A ("Decision"). In brief, the decision held that plaintiff's right-of-way, A-063173, for a material site was null and void as to the lands situated within the boundaries of Native allotment AA-6000, Parcel B.

The Decision made certain important factual findings as follows:

> On March 27, 1972, Native allotment application AA-6000 was filed on behalf of Lucy Williams by the Bureau of Indian Affairs. Williams claimed use and occupancy of the land from July 1955. The allotment, designated as

> AA-6000, Parcel B, was legislatively approved effective June 1, 1981.
>
> On August 17, 1965, the State of Alaska, Department of Highways, filed application A-063173 for a material site right-of-way for use in construction and maintenance of the Edgerton Highway between Kenny Lake and Chitna. Pursuant to the Act of August 27, 1958, 23 U.S.C. § 317 (1988), the right-of-way was granted on April 28, 1966, subject to all valid existing rights existing on the date of the grant.

R. 528-C – 528-B (footnote omitted).

The Decision held that once the Native allotment application was approved, the approval related back to the time of Native occupancy, thus rendering the entry in July of 1955 a valid existing right superior to the right-of-way grant. The consequence, of course, was invalidation of the right-of-way as to lands within Native Allotment AA-6000, Parcel B. The Decision cited *State of Alaska*, 110 IBLA 224 (1989), and *Golden Valley Electric Association (On Reconsideration)*, 98 IBLA 203 (1987), as authority for the holding. R. 528-B.

There is pending federal defendants' motion to dismiss at docket 11, which has been fully briefed. There are several subsequent motions on file. No oral argument has been requested. In view of the court's disposition of the motion at docket 11, it is unnecessary to address any of the subsequent motions.

In the case at bar, federal defendants urge dismissal for want of jurisdiction over the United States on the grounds that the land in question is held in trust for an Indian by the sovereign which has not waived immunity

from suit. Federal defendants rely on the Quiet Title Act, 28 U.S.C. § 2409a(a) which specifically provides that the waiver of sovereign immunity therein expressed does not apply to trust or restricted Indian lands. The government also argues that the decision by Judge Singleton in *State of Alaska v. Lujan*, F90-006 CIV JKS, now on appeal, operates to preclude this court's examination of the effect of the Quiet Title Act, because Judge Singleton's opinion held that the Act establishes a lack of subject matter jurisdiction in the district court in a case that in most respects is identical to the instant matter.

Plaintiff State of Alaska advances several bases for jurisdiction, but the principal one relied upon is the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* ("APA"). Plaintiff argues that federal defendants' reliance on the Quiet Title Act, puts the cart before the horse by assuming the validity of the Decision in order to establish that the lands in question are actually held in trust. For their part, federal defendants urge that sovereign immunity would not mean much if it did not render the sovereign immune from suit. There are interesting and perhaps difficult questions lurking in this particular thicket of jurisprudence. However, it is unnecessary to enter the brambles given the record in this matter.

Jurisdiction exists under the APA unless it is removed by the Quiet Title Act. 5 U.S.C. § 702. Here, the Decision on its face does not support the premise needed for application of the Quiet Title Act, because the Decision specifically states that the allotment application was filed on March 27, 1992 [sic], which is too late for the allotment to have been legislatively approved.

The relevant statutory provision, 43 U.S.C. § 1634(a)(1), provides legislative approval of allotment applications "which were pending before the Department of the Interior on or before December 18, 1971". Thus, by its own terms the Decision indicates that there is no basis for Indian trust title to the land within allotment AA-6000, Parcel B. It follows that the Quiet Title Act limitation on the waiver of sovereign immunity has no application to the review of the Decision.[1]

For what appears to be the first time in the proceedings, the federal defendants have advanced evidence in an affidavit filed as exhibit 8 to their reply brief at docket 40 to support the proposition that the allotment application was actually pending as early as August 9, 1971, before the Department of Interior's Bureau of Indian Affairs. The affidavit was executed on October 6, 1993, and could not possibly have been considered in the Decision, because it was rendered on December 21, 1992.

The argument that the allotment application was not timely filed was raised by the State in the administrative proceeding. R. 462-461. However, the argument was not expressly addressed in the Decision. The Decision does include a "catchall" sentence reciting, "To the extent that the State has made other arguments that have not been expressly discussed, they have been considered and rejected." R. 528-B.

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[1] Given that the Decision on its face does not establish the existence of Indian trust title, Judge Singleton's decision in *State of Alaska v. Lujan*, F90-006 CIV JKS, that the Quiet Title Act defeats jurisdiction in the district court must be distinguished.

Under the circumstances, this court must conclude either (i) that the timeliness of the allotment application was considered and the fact found (application filed on March 27, 1972) cannot support the conclusion reached (legislatively approved because application pending on December 18, 1991 [sic]), or (ii) that despite the "catchall" statement, the timeliness of the application was not actually considered.

For the reasons set forth above, the court finds that the record is inadequate to allow it to address the merits of the motion to dismiss. If the allotment application was in fact timely filed, it is evident that there is a serious question as to the existence of jurisdiction in this court. Under these circumstances, it is necessary for the court to remand this matter to the Interior Department for clarification of the Decision, and, if there is a dispute as to the timeliness of the application, a hearing to determine when the allotment application was in fact filed.[2]

THEREFORE, IT IS ORDERED: The motion at docket 11 is DENIED without prejudice; this matter is hereby REMANDED to the Department of the Interior for further proceedings consistent with this order; and this case is DISMISSED.

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[2] It may be noted that the affidavit submitted recites that the records of the Bureau of Indian Affairs establish that the application and a related witness statement attached to the affidavit were received by the Bureau of Indian Affairs in August of 1991 [sic], yet neither of the attached documents bears any date stamp indicating when it was received. The omission of the date stamp may not be determinative, of course, but it certainly raises a question whose answer appears to deserve further inquiry.

DATED at Anchorage, Alaska, this 22nd day of November, 1993.

/s/ John W. Sedwick
JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE

Copies to:

Athens
Dunsmore
DuBrock
O & J file
11-23-93 cpb

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

STATE OF ALASKA, Plaintiff, vs. BRUCE E. BABBITT, et al., Defendants.	)	Case No. F93-016 CIV (JWS) ORDER FROM CHAMBERS (Filed Jan. 25, 1994)

There are two matters to address. First in time is the motion to reconsider at docket 50. However, before I can address that motion on its merits, I must deal with the federal defendants' recent suggestion that I recuse myself.

The suggestion is based upon the fact that I recused myself in Case No. F93-038 CIV (JWS). The federal defendants correctly point out that the basis for the requested recusal in that case exists in this case. However, the federal defendants have not carefully read the recusal order in F93-038. There, I was careful to point out that the basis for the requested recusal was the concept that advocacy of a particular legal theory by the judge's former law firm (while he was still there) in an unrelated case should require recusal. In the recusal order in F93-038. I pointed out that there was serious institutional problems with the "advocacy of issue equals conflict of interest" concept underpinning the request for recusal. However, noting that the case had just begun and that a recusal would eliminate any question about an issue which at least one party took seriously, I elected to recuse myself.

In the case at bar, the situation is different in the sense that the parties and the court have considerable effort invested in the action before me. More to the point, this investment of effort means that I must decide if "issue advocacy" is a proper basis for recusal. I find that it is not. Such a basis for recusal must ultimately accept the proposition that a lawyer can only argue one side of an issue. That is palpably unreasonable and therefore could not create a reasonable appearance of impropriety. I therefore refuse to recuse myself.

Turning to the motion for reconsideration, it should be noted that the federal defendants have maintained all along that the Quiet Title Act, 28 U.S.C. § 2409a establishes that this court lacks jurisdiction. Reconsideration of the court's earlier decision in light of the Ninth Circuit decision in *Wildman v. U.S.*, 827 F.2d 1306 (9th Cir. 1987) convinces the court that it erred when it decided that it had jurisdiction over this action.

It is true that the very decision which plaintiff seeks to have reviewed is on its face not entirely adequate to establish that there is any Indian restricted or trust property involved. This is so, because the decision recites that the allotment application was filed on March 27, 1992 [sic], by the Bureau of Indian Affairs on behalf of the applicant, while the deadline for filing with the Department of the Interior was December 18, 1992 [sic]. Nevertheless, as Judge Hug's concurring opinion in *Wildman* makes clear, this is not enough to prevent invocation of restricted or trust title as a bar to jurisdiction under 28 U.S.C. § 2409a, unless the decision can be construed as nothing but "a bare assertion" that such title exists.

This court cannot characterize the decision which plaintiff challenges as evidencing no more than a bare assertion of Indian title. The decision represents the result of an administrative process aimed specifically at determination of the validity of the allotment application and in which the argument that the application was made late was raised and rejected (even if only in the "catchall" sentence). That the application was filed with the Bureau of Land Management by a sister agency within the Interior Department is consistent with a timely filing by the applicant herself with the Bureau of Indian Affairs. The affidavit of Rose Brady submitted by federal defendants suggests that this is exactly what happened.

Under the circumstances, there is clearly a "colorable claim" that restricted or trust title is involved. That is enough to allow invocation of the Quiet Title Act. *Wildman*, 827 F.2d at 1309. Indeed, this court finds that there is even a substantial possibility that there is, in fact, restricted or trust title involved, such that, even under the test set out by the Eighth Circuit in *Spaeth v. United States Secretary of Interior*, 757 F.2d 937, 943 (8th Cir. 1985), the Quiet Title Act operates to deprive this court of jurisdiction.

For the reasons set forth above, the court **GRANTS** the motion for reconsideration at docket 50, and upon reconsideration also **GRANTS** the federal defendants' motion to dismiss for want of jurisdiction at docket 11. The order at docket 48 is **VACATED.** This action is hereby **DISMISSED.**

Dated at Anchorage, Alaska, this 21st day of January 1994.

/s/ John W. Sedwick
JOHN W. SEDWICK
UNITED STATES
DISTRICT JUDGE

cc: Athens/Dunsmore/DuBrock/O&J File

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
Interior Board of Land Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

STATE OF ALASKA

IBLA 90-225 Decided December 21, 1992

Appeal from a decision of the Glennallen District Manager, Alaska, Bureau of Land Management, declaring right-of-way A-063173 null and void as to lands within Native allotment AA-6000, Parcel B.

Affirmed.

1. Alaska: Native Allotments – Rights-of-Way: Nature of Interest Granted

   Where, after a Native initiates use and occupancy of certain lands, a right-of-way is sought and granted by BLM across such lands, subject to valid existing rights, the later filing of the allotment application vests the inchoate preference right arising from use and occupancy, and that right relates back to the initiation of use and occupancy, thereby taking precedence over the intervening right-of-way, which is properly declared null and void.

APPEARANCES: E. John Athens, Jr., Esq., Assistant Attorney General, State of Alaska, Fairbanks, Alaska, for appellant; Regina L. Sleater, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The State of Alaska, Department of Transportation and Public Utilities (State), has appealed a January 19, 1990, decision by the Glennallen District Manager, Alaska, Bureau of Land Management (BLM), declaring right-of-way A-063173 null and void as to lands within Native allotment AA-6000.

On March 27, 1972, Native allotment application AA-6000 was filed on behalf of Lucy Williams by the Bureau of Indian Affairs. Williams claimed use and occupancy of the land from July 1955. The allotment, designated as AA-6000, Parcel B, was legislatively approved effective June 1, 1981.[1]

On August 17, 1965, the State of Alaska, Department of Highways, filed application A-063173 for a material site right-of-way for use in construction and maintenance of the Edgerton Highway between Kenny Lake and Chitna. Pursuant to the Act of August 27, 1958, 23 U.S.C. § 317 (1988), the right-of-way was granted on April 28, 1966, subject to all valid existing rights existing on the date of the grant.

In the decision here appealed, BLM declared the right-of-way null and void as to lands within Native allotment AA-6000 because the allotment applicant's use and occupancy predated the filing of the right-of-way application.

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[1] Parcel B is described as the SE¼ SW¼ SW¼, lot 13, sec. 27 and lots 8, 9, and 13, sec. 34, T. 2 S., R. 4 E., Copper River Meridian, Alaska.

The State contends that it should be allowed to contest the allotment, that the allotment should be adjudicated, that the right-of-way is a valid existing right, that legislative approval does not preclude inquiry into the sufficiency of the allotment applicant's use and occupancy, and that the Department is without jurisdiction to consider the allotment, and is estopped to deny the validity of the right-of-way. The State requests that we reexamine our position as set forth in *State of Alaska*, 110 IBLA 224 (1989), *stipulation for dismissal filed, State of Alaska v. Lujan*, No. F90-006 (D. Alaska June 22, 1992).

[1] BLM asserts that the arguments proffered by the State have been addressed in *State of Alaska, supra*. That case involved a conflict between Federal Highway Act rights-of-way and Native allotments, where the allotment applications were filed after the grants of the rights-of-way, but Native use and occupancy preceded those grants. There, as here, the rights-of-way were granted subject to valid existing rights: the rights of the Native allottee who had used and occupied the land before the filing of the right-of-way applications. In *State of Alaska*, 110 IBLA at 229, we found applicable the valid existing rights analysis articulated in *Golden Valley Electric Association (On Reconsideration)*, 98 IBLA 203, 208 (1987). That rationale is that an inchoate preference right, established by Native use and occupancy at the time of the right-of-way grant becomes a vested preference right upon completion of use and occupancy and the filing of an allotment application and *"preempts conflicting applications filed after* [initiation of use and occupancy] *although prior to*

filing of the Native allotment application." (Emphasis supplied.) Further, responding to an argument that the allotment should issue subject to the rights of way, we noted that no authority had been cited under which BLM would be required to so limit the allotment. *State of Alaska*, 110 IBLA at 229, n. 4. These decisions are dispositive of the present appeal.

The State's arguments relating to jurisdiction and estoppel were considered and rejected in *State of Alaska, Golden Valley Electric Association*, 110 IBLA at 230, 231.

To the extent that the State has made other arguments that have not been expressly discussed, they have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

/s/ John H. Kelly
John H. Kelly
Administrative Judge

I concur:

/s/ Will A. Irwin
Will A. Irwin
Administrative Judge

2821 (050)
A-063173

JAN 19 1990

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Alaska Dept. of	:	A-063173
Transportation and	:	Federal Aid Highway
Public Facilities	:	Material Site
Northern Region, Right-of-way	:	Right-of-Way
600 University Ave., Suite F	:	
Fairbanks, AK 99709-1090	:	

RIGHT-OF-WAY GRANT
DETERMINED NULL AND VOID IN PART

On August 17, 1965, Alaska Department of Highways, filed an application for a Material Site right-of-way, for use in construction and maintenance of the Edgerton Highway between Kenny Lake and Chitna (A-063173), pursuant to the Act of August 27, 1956, (72 Stat. 885, 23 U.S.C. 317). The material site right-of-way, A-063173, was granted on April 29, 1966, under the authority of above Act.

On March 27, 1972, the Bureau of Indian Affairs filed Native Allotment application and evidence of occupancy (AA-6000 parcel B) on behalf of Lucy Williams, for the lands described as $SE^1/_4SW^1/_4SW^1/_4$, portion of lot 3, Sec. 27 and lots 8, 9 and portion of lot 3, Sec. 34, T. 2 S., R. 4 E., Copper River Meridian, Alaska. In 1985 the area was

remonumented and Parcel B is now described as SE1/4SW 1/4SW1/4, lot 13, Sec. 27 and lots 8, 9 and 13, Sec. 34, T. 2 S., R. 4 E., Copper River Meridian, Alaska. The applicant claims use and occupancy since July 1955.

The Native allotment application has been reviewed under the provisions of the Alaska National Interest Lands Conservation Act (ANILCA) of December 2, 1980, and AA-6000 Parcel B has been legislatively approved, effective June 1, 1981.

As stated in number 1 of the Terms and Conditions of Grant attached to and made part of the Grant . . .

> . . . this grant is subject to all valid and existing rights existing on the effective date of this grant.

As the Native applicant's use and occupancy commenced, prior to the application for the material site right-of-way and as the terms and conditions set forth in the right-of-way grant were made subject to valid existing rights, the material site right-of-way grant, casefile A-063173, issued, April 28, 1966, is hereby determined to be null and void as to those lands within Native Allotment, AA-6000 described as; SE1/4SW1/4SW1/4, lot 13, Sec. 27 and lots 8, 9 and 13, Sec. 34, T. 2 S., R. 4 E., Copper River Meridian, Alaska.

An appeal from this decision may be taken to the Board of Land Appeals, Office of Hearings and Appeals, in accordance with the attached regulations in Title 43 *Code of Federal Regulations* (CFR), Part 4, Subpart E. If an appeal is taken, the notice of appeal must be filed in the Glennallen District Office of the Bureau of Land Management within 30 days of the receipt of this decision. The Appellant has the burden of showing that the decision appealed

from is in error. Do not send the appeal directly to the Board. The appeal and case history file will be sent to the Board from this office. The regulations also require the appellant to serve a copy of the notice of appeal, statement of reasons, written arguments or briefs on the Regional Solicitor, Alaska Region, U.S. Department of the Interior, Federal Building, U.S. Courthouse, Room A25, 222 W. 8th Avenue, #34, Anchorage, Alaska 99513-7584. to avoid summary dismissal of the appeal, there must be strict compliance with the regulations. Form 1842-1 is enclosed for additional information.

/s/ Gene R. Keith
Gene R. Keith
District Manager

3 Attachments:
1 - MTP
2 - Appeal Regulations
3 - Form 1842-1

Copy furnished to:

Lucy Williams (Deceased)
Bureau of Indian Affairs (CM-RRR)
Anchorage Agency, Reality [sic]
1675 C Street
Anchorage, Alaska 99501-5198
(w/MTP)

Ahtna, Incorporated
P.O. Box 649
Glennallen, Alaska 99588
(w/MTP)

Bureau of Indian Affairs (CM-RRR)
Alaska Title Services Center (ATSC)
1675 C Street
Anchorage, Alaska 99501-5198
(w/MTP)

State of Alaska (CM-RRR)
Department of Natural Resources
Division of Land and Water Management
State Interest Determinations Unit
P.O. Box 107005
Anchorage, Alaska 99510-7005
(w/MTP)

Copper River Native Association
Attn: Less Sutherland
Drawer H
Copper Center, Alaska 99573
(w/MTP)

Allyson Johnson, AK 968

(Dated 5/14/85)

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Lucy Williams 3407 North Star Drive, Apt. 1 Anchorage, Alaska 99503	:	AA-6000 Native Allotment
Title Administration Department of Natural Resources Division of Technical Services Pouch 7-005 Anchorage, Alaska 99510	:	AA-21218 State Selection
Lower Tonsina, Inc. Drawer G Copper Center, Alaska 99753	:	AA-10535 Native Group Selection
Chitina Native Corporation P.O. Box 3 Chitina, Alaska 99566	:	AA-6653-B Village Selection
AHTNA, Inc. Drawer G Copper Center, Alaska 99573	:	AA-8104-2 Regional Selection
State of Alaska Department of Highways SE District Box 3-1000 Juneau, Alaska 99801	:	A-063173 Right-of-Way

Native Allotment Legislatively Approved, Parcel B
State Selection Rejected in Part
Native Group Selection Rejected in Part
Village Selection Rejected in Part
Regional Selection Rejected in Part

On March 27, 1972, the Bureau of Indian Affairs filed a Native allotment application and evidence of occupancy on behalf of Lucy Williams. The application is for approximately 40 acres of surveyed land described as follows:

Parcel B: SE4SW4SW4, portion of Lot 3, Sec. 27 and lots 8, and 9, portion of lot 3, Sec. 34, T. 2 S., R. 4 E., Copper River Meridian, Alaska.

The applicant claims occupancy of these lands since July 1955.

On June 1, 1981 the State of Alaska filed a protest pursuant to Sec. 905(a)(5)(B) of the Alaska National Interest Lands Conservation Act (ANILCA) of December 2, 1980 (43 U.S.C. 1634) against Native allotment AA-6000, Parcel B of Lucy Williams.

The protest fails to provide the specific facts upon which the conclusions concerning access are based (as required by Sec. 905(a)(5)(B) of ANILCA). Therefore, the protest must be and is hereby summarily dismissed.

The Native allotment application has been reviewed under the provisions of the Alaska National Interest Lands Conservation Act (ANILCA) of December 2, 1980, and Parcel B has been legislatively approved, effective June 1, 1981, pending confirmation of location, as to the lands described above.

All applications approved pursuant to ANILCA are subject to the provisions of the Act of March 8, 1922 (42 Stat. 415). It has been determined that the above-described lands are without value for minerals.

The following will be reserved to the United States:

> A right-of-way for ditches or canals constructed by the authority of the United States pursuant to the Act of August 30, 1890, 26 Stat. 391; 43 U.S.C. 945.

A map showing the approximate location(s) is enclosed.

On November 14, 1978, the State of Alaska filed general purposes grant selection application AA-21218 pursuant to Sec. 6(b) of the Alaska Statehood Act of July 7, 1958 (48 U.S.C. Ch. 2, Sec. 6(b)), for the subject lands. The allotment was legislatively conveyed, therefore, the State selection is rejected as to the land described above and all the minerals therein.

On June 29, 1976, Lower Tonsina, Inc. filed selection application AA-10535, as amended, under the provisions of Sec. 14(h)(2) of the Alaska Native Claims Settlement Act (ANCSA) of December 18, 1971 (43 U.S.C. 1601) for the subject lands. The allotment was legislatively conveyed and therefore selection application AA-10535 is rejected as to the land described above.

On November 7, 1974, Chitna Native Corporation filed selection application AA-6653, as amended, under the provisions of Sec. 12(a) of the Alaska Native Claims Settlement Act (ANCSA) of December 18, 1971 (43 U.S.C.

1601) for the subject lands. The allotment was legislatively conveyed and therefore selection application AA-6653 is rejected as to the land described above.

On July 24, 1974, AHTNA, Inc. filed selection application AA-8104-2, as amended, under the provisions of Sec. 12(c) of the Alaska Native Claims Settlement Act (ANCSA) of December 18, 1971 (43 U.S.C. 1601) for the subject lands. The allotment was legislative conveyed; therefore, the regional selection application is rejected as to the land described above and all the minerals therein.

On August 17, 1965, the State of Alaska, Department of Highways, filed right-of-way application A-063173 for a material site on a portion of Lucy Williams' Native allotment. The grant was issued April 28, 1966; however, Lucy's use and occupancy predates the application and the grant; therefore, Parcel B is approved as stated above.

Before certificate of allotment can be issued for the land, the boundaries must be surveyed by the government. The survey of the land will be done in the regular order of business, but may require several years due to the large number of allotments already scheduled. The applicant will be notified when the official plat of survey is filed.

Any questions the applicant may have regarding use relative to the Native allotment should be directed to the Bureau of Indian Affairs at the following address.

Bureau of Indian Affairs
Realty Office
P.O. Box 100120
Anchorage, Alaska 99510-0120

An appeal from this decision may be taken to the Board of Land Appeals, Office of Hearings and Appeals, in accordance with the attached regulations in Title 43 CFR, Part 4, Subpart E. If an appeal is taken, the notice of appeal must be filed in the Alaska State Office of the Bureau of Land Management within 30 days of the receipt of this decision. Do not send the appeal directly to the Board. The appeal and case history file will be sent to the Board from this office. The regulations also require the appellant to serve a copy of the notice of appeal, statement of reasons, written arguments or briefs on the Regional Solicitor, Alaska Region, U.S. Department of the Interior, 701 C Street, Box 34, Anchorage, Alaska 99513. to avoid summary dismissal of the appeal, there must be strict compliance with the regulations. Form 1842-1 is enclosed for additional information.

If an appeal is forthcoming, the adverse party to be served is:

Lucy Williams
3407 North Star Drive, Apt. 1
Anchorage, Alaska 99503

Paul O. Johnson
Chief, Native Allotment Section

Enclosures:
Form 1842-1
Appeal Procedures
Map of area

Copy furnished to:

Bureau of Indian Affairs (CM-RRR)
Realty Office
P.O. Box 100120
Anchorage, Alaska 99510-0120
(w/cy of field report)

cc:

Bureau of Indian Affairs
Title Plant
Attention: Joyce Harvey
P.O. Box 100120
Anchorage, Alaska 99510

State of Alaska
Retained Lands Unit – Allotments
Division of Land and Water Management
Alaska Department of Natural Resources
Pouch 7-005
Anchorage, Alaska 99510
(w/cy of area map)

AM-G (017)

AHTNA MDE (961)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF ALASKA, Plaintiff-Appellant, v. BRUCE BABBITT, Secretary of the Interior; UNITED STATES OF AMERICA; ELIZABETH SIMMONDS, on behalf of Levi Simmonds, a minor; DIANE MAY WILLIAMS KOCHENDORFER, Defendants-Appellees.	) No. 94-35130)) D.C. No.) CV-93-00016-JWS)) ORDER)) (Filed Dec. 19, 1994)

Before: WRIGHT, BEEZER and FERNANDEZ, Circuit Judges.

The panel has voted to deny the petition for rehearing, and Judges Beezer and Fernandez have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED** and the suggestion for a rehearing en banc is **REJECTED.**

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Anchorage Region
Juneau Field Office
P. O. Box 1751
Juneau, Alaska

Memorandum March 22, 1963

To: Area Director, Bureau of Indian Affairs, Juneau

From: Field Solicitor

Subject: Authority of Bureau of Land Management to grant rights-of-way on Native land allotment entries

The Regional Solicitor, Anchorage, has forwarded to me for answer your request of May 28, 1962, regarding the propriety of certain procedures involved in the above described problem.

During August of 1961, the Alaska Department of Highways made application to your office for a right-of-way across two Indian allotment entries. The application was made pursuant to 25 U.S.C. 323, 62 Stat. 17, an act providing for rights-of-way for all purposes across Indian lands. The State required the land for the purposes of a federal aid highway.

Later, while in Anchorage, Charles H. Jones, your Area Realty Officer checked these two cases with the BLM Land Office there. He discovered that BLM had granted these rights-of-way in accordance with 43 CFR, Part 241. The entrymen in this case concurred in the grant by BLM of these rights-of-way.

The two Indian allotment entries were made pursuant to 49 U.S.C. 357, 34 Stat. 197. The appraisals made by the State were recently reviewed by the Real Property Officer in your Anchorage Field Office and in his opinion the values placed on the land are reasonable. Thus the only question submitted for my conclusions is the propriety of the procedure followed. Since the entrymen have not used and occupied the land for five years, no certificate of allotment has yet been issued. BLM retained the funds paid by the State for the rights-of-way.

The questions you ask regarding the above facts are these: (1) who has authority to grant these rights-of-way and (2) who is entitled to receive the funds paid by the State for the rights-of-way?

Sec. 323 of Title 25, U.S.C., provides that the Secretary of the Interior is empowered to grant rights-of-way across Indian lands. Pursuant to this grant of authority the Secretary has promulgated regulations delegating his authority under the statute to the Bureau of Indian Affairs. See 25 CFR, Part 161, Rights of way Over Indian Lands.

Additional provisions are made for the granting of rights-of-way over non-Indian lands by the Bureau of Land Management. More accurately it should be stated that the Bureau of Land Management is the agency concerned with the usual grant of a right-of-way, Indian lands excepted. See 43 CFR, Part 244, particularly Sec. 244.2.

Thus the question is presented: What is the status of the land entered pursuant to the Indian homestead allotment act?

Your opinion request does not state what character the lands involved had prior to the entry. They are referred to by township and range descriptions; for the purposes of this memorandum I will assume that they were public lands.

Rephrasing the first question slightly, you are in effect asking whether the entry of public lands under the Indian allotment act results in these lands becoming, by that act alone, Indian lands. My opinion is that such an entry does not turn the lands into Indian lands within the meaning of 43 CFR Sec. 244.2

In Federal Indian Law (1958 ed.) at 957 it is stated that:

> Under the act of May 17, 1906, the Secretary of the Interior may allot nonmineral land not exceeding 160 acres to any native who is the head of a family or who is 21 years of age. It also provides that such allotment shall be deemed the homestead of the Allottee and his heirs forever and shall be inalienable and non-taxable until Congress provides otherwise. The allotment right is limited to a single entry and may not include incontiguous tracts of public land. (Memo. Assoc. Sol. H. 36352, June 27, 1956.)

The land may then be treated as public lands – if such was its prior character – until a certificate of allotment is granted.

Since then the lands are public lands it follows that BLM is the agency to approve a right-of-way permit.

Your second question related to the right of the Bureau of Land Management to retain the proceeds paid by the State. My opinion is that the allotment entrymen are

entitled to any monies paid by the State for the right-of-way. The interest of the United States is not compensable under 48 U.S.C. 361d as the State, as builder of the road, succeeds to the interest of the United States. The only interest being compensated for is the entryman's. Compare *Charlie*, 44 L.D. 113, with the act of August 2, 1956 (48 U.S.C. 357, as amended, 70 Stat. 954).

UNITED STATES
DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT
Anchorage District & Land Office
555 Cordova Street
Anchorage, Alaska 99501

Date: APR 28 1966

DECISION

RIGHT-OF-WAY GRANTED

Details of Grant

Serial number of grant	**Anchorage 063173**
Name of Grantee	**State of Alaska Department of Highways**
Map showing the location and dimensions of grant:	**Project No. S-0851(29)**
Map designations	**Parcel No. M.S. 851-070-5**
Date Filed	**August 17, 1965**
Permitted use by Grantee	**Material Source**
Authority for grant	**Act of August 27, 1958 (72 Stat. 885) as amended**
Regulations applicable to grant:	**43 CFR 2234.1-2234.2**
Code reference	**(23 U.S.C. 317)**
Date of grant	
Expiration date of grant	**N/A**
Rental:	
Amount	**N/A**
When payable by grantee	**N/A**

Terms and Conditions of Grant

Pursuant to the authority vested in the undersigned by Order No. 701 of the Director, Bureau of Land Management, dated July 23, 1964 (64 F.R. 7492), as amended, a right-of-way, the details of which are shown above, is hereby granted for the public lands involved[1], subject to the following terms and conditions:

1. All valid rights existing on the date of the grant.

2. All regulations in 43 CFR 2234 as more specifically set forth in the attached terms and conditions.

3. Filing of proof of construction within 7 years from date of the grant.

4. Other: **Subject to the right of the United States or its permittee or licensees to enter upon, occupy and use any or all of such lands for power purpose, and subject also to the condition that should the lands be required for purposes of power development, any structures or improvements placed thereon by the applicant shall be removed or relocated at no cost to the United States, its permittee or licensees in such development.**

---

[1] For the purpose of this grant, public domain lands include those reserved or withdrawn for specific purposes, entered, selected, occupied and/or settled, and leased.

5. **Subject to the attached stipulations which are made a part hereof by reference.**

/s/ Pearl C. Peters

Chief, Adjudication Section
Lands Branch

Attachments:

Map
Terms & Conditions

cc: **Department of Highways, Right-of-Way Section, Alaska Bureau of Public Roads, Anchorage**

Form 2:12-3
(June 1966)
(formerly 4-021 & 2212-4)

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

FORM APPROVED
BUDGET BUREAU NO. 42-R1359.2

Land Office & Serial Number
AA-6000
Dated 6-26-70

File in proper Land Office

AMENDED
ALASKA NATIVE ALLOTMENT APPLICATION AND EVIDENCE OF OCCUPANCY

Act of May 17, 1906 (34 Stat. 197)

1. Name of Applicant *(first, middle initial, and last)*
Lucy V. Williams

Address *(include zip code)*
P. O Box 13
Glennallen, Alaska 99588

2a. Are you a [x] full [ ] mixed blood? [x] Indian [ ] Aleut [ ] Eskimo

b. Were you born and are you now residing in the State of Alaska? [x] Yes [ ] No

3. Sex of Applicant
[ ] Male [x] Female

4a. Are you head of a family? [ ] Yes [x] No
b. Are you at least 21 years of age? [x] Yes [ ] No

5. Give legal description of the lands applied for *(If lands are unsurveyed, describe them in a manner sufficient to permit their ready identification on the ground)*

SE¼SW¼ Sec. 27, T. 2 S., R. 4 E., C.R.M. Valdez (C-2)

As shown on the attached portion of a copy of USGS Quadrangle Map which becomes a part of this application.

35a

6a. Is the land applied for essentially nonmineral? [X] Yes [ ] No *(If "no," specify mineral)*

b. Is the land claimed for mining purposes by any person including yourself? [ ] Yes [x] No

c. Is the land occupied or improved by any person other than yourself? [ ] Yes [x] No

7. Have you received any other allotment under the Act of May 17, 1906, *supra* [ ] Yes [x] No *(If "yes," explain)*

RECEIVED
MAR 27 1 15 PM '72
BUREAU OF LAND MANAGEMENT
ANCHORAGE, ALASKA

8a. From what date have you occupied the land applied for? July , 19 55

b. Are the corners marked and posted as required by the regulations? [x] Yes [ ] No

EVIDENCE OF OCCUPANCY

1. PERIODS OF ACTUAL RESIDENCE ON THE LAND

CALENDAR YEAR	BEGAN MONTH	BEGAN DAY	ENDED MONTH	ENDED DAY	IF ABSENT FROM THE LAND, GIVE REASONS
1955	Jul		Oct		Seasonal
to present					

2. CULTIVATION OF THE LAND

CALENDAR YEAR	ACRES CULTIVATED	TYPE OF CROPS PLANTED	QUANTITY OF CROPS HARVESTED
		None	

3. DOMESTIC ANIMALS KEPT ON THE LAND

CALENDAR YEAR	KIND OF ANIMALS	NUMBER OF ANIMALS
	None	

4. IMPROVEMENTS

DESCRIPTION OF IMPROVEMENTS	VALUE OF IMPROVEMENTS	DATE MADE
None		
	$	

5. FISHING, TRAPPING, AND OTHER USES OF THE LAND

CALENDAR YEAR	USE BEGAN MONTH	USE BEGAN DAY	USE ENDED MONTH	USE ENDED DAY	TYPE OF USE	REMARKS
1955	Jul		Oct		Berries, hunting	
to present						

Remarks *(Enter here any other information showing compliance with the requirements of the law for substantially continuous use and occupancy of the land for a period of 5 years)*

I have used this land for subsistence in the native way.

I CERTIFY That the statements made herein are true, complete, and correct to the best of my knowledge and belief and are made in good faith.

8/9/71
(Date)

Lucy J. Williams
(Signature or mark of Applicant)

(Signature of Witness)

WITNESSES MUST SIGN ONLY IF APPLICANT ENDORSES APPLICATION WITH HIS MARK OR THUMB PRINT RATHER THAN BY SIGNATURE

(Signature of Witness)

FOR USE OF BUREAU OF INDIAN AFFAIRS

I CERTIFY HEREBY That the above-named applicant is a native entitled to an allotment under the appropriate regulations in 43 CFR 2212.

Delores N. Rawlins
(Signature)

MAR 22 '72
(Date)

Realty Specialist
(Title)

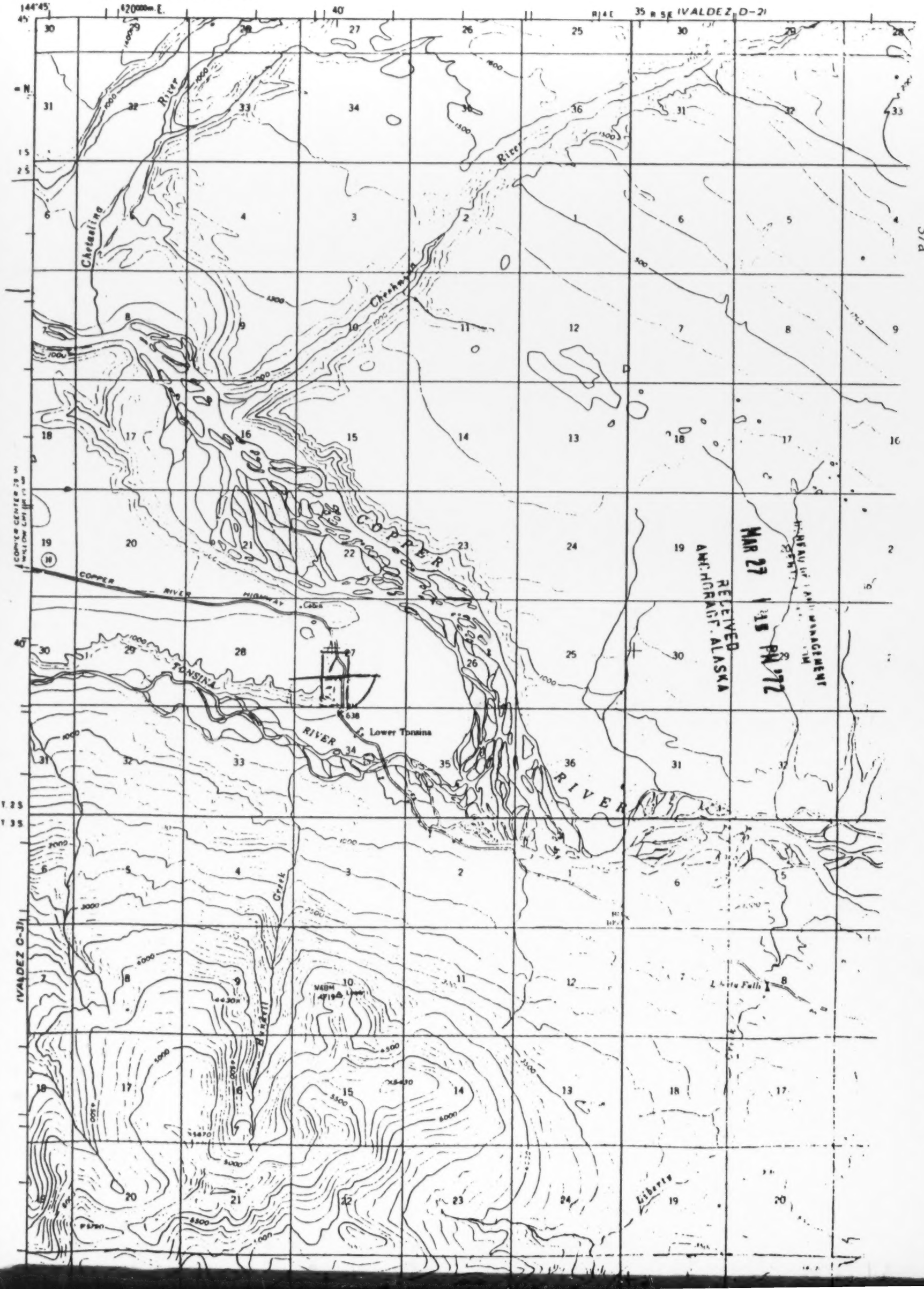
Title 18 U.S.C. Section 1001, makes it a crime for any person knowingly and willfully to make to any department or agency of the United States any false, fictitious, or fraudulent statements or representations as to any matter within its jurisdiction.

GPO 888-113

36a

VALDEZ

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY



37a

2800(941)
A-063173

State Office
555 Cordova Street, Pouch 7-512
Anchorage, Alaska 99510

DECISION

State of Alaska Department of Transportation Central and Southcentral Regions P.O. Box 6750 Anchorage, Alaska 99502	: : : : : : :	Serial No.: A-063173 Date of Grant: April 28, 1966 Right-of-Way (Filed Oct. 12, 1978)

Proof of Construction/Use Accepted

The above-captioned grantee having complied with the requirements of the law and regulations and the proof of construction/use filed on July 27, 1972 is hereby accepted and approved.

/s/ Robert E. Sorenson

Chief, Branch of Lands
and Minerals Operations

cc:

DM-A (017)

PBower:jg 10/6/78

DOUGLAS B. BAILY
ATTORNEY GENERAL

E. John Athens, Jr.
Assistant Attorney General
State of Alaska, Department of Law
100 Cushman, Suite 400
Fairbanks, AK 99701
Telephone: (907) 452-1568

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

Appeal of State of Alaska, Department of Transportation and Public Facilities	)	A-063173 Federal Aid Highway Material Site AA-6000, Parcel B Native Allotment

IBLA No. 90-225

AFFIDAVIT OF SHARI HOWARD

STATE OF ALASKA)
) ss.
FOURTH JUDICIAL DISTRICT)

Shari Howard, being first duly sworn, deposes and says:

1. I am employed by the Alaska Department of Transportation and Public Facilities, Northern Region. I am employed as a Right-of-Way Agent. As such I have access to the Northern Region highway right-of-way and

material site files, and I am familiar with the Department's right-of-way acquisition procedures. I have examined all of the Department's files pertaining to the right-of-way material site grant A-063173. This is the BLM grant to the State of Alaska for a material site for highway project S-0851(29) for the Edgerton Highway. It is designated by the State of Alaska as M.S. 851-070-5.

2. The Department has no record that Lucy Williams ever objected to the material site grant A-063173, or objected to its development and use. This material site has been in use by the State of Alaska for the Edgerton Highway since 1966 to the present. It continues to be needed for maintenance of the highway. The Department has never received a protest or complaint concerning grant A-63173 from Lucy Williams or anyone acting on her behalf. The first notice the state received from the BLM indicating there was a problem with grant A-063173 was the BLM decision it received in January 1990.

3. The next closest material site to grant A-063173 is 15 miles away. The state tries to have material sources for its highways no more than 6 miles apart, although load limits and haul costs and other factors often dictate closer spacing of material sites. There is no longer public domain land under the jurisdiction of the BLM (or state land) within 15 miles of grant A-063173 which is accessible for use as a material site or which could be used for a material site. All available public domain land was selected by Ahtna, Inc., and/or other private parties. For the state now to obtain a substitute material site for A-063173, it would have to acquire the site from a private landowner and pay fair market value. Loss of grant

A-063173 would represent a significant financial loss to the state.

/s/ Shari Howard
Shari Howard

SUBSCRIBED AND SWORN TO before me this 15th day of March, 1990.

/s/ Judy A. Geraghty
Notary Public, State of Alaska
My commission expires: 9/15/93

Appeal of State of Alaska
Re: Lucy Williams Allotment
IBLA No. 90-225
A-063173 & AA-6000, Parcel B

STATE OF ALASKA
DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

November 2, 1994

BY EXPRESS MAIL

Ms. Cathy A. Catterson
Clerk of the Court
U.S. Court of Appeals
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *Alaska v. Babbitt*
[Williams]
9th Cir. No. 94-35130

Dear Ms. Catterson:

In accordance with FRAP 28(j), appellant State of Alaska advises you of the following pertinent and significant authority:

State of Alaska, DOT&PF, 131 IBLA 121, 126-128 (October 25, 1994).

This decision was received in this office on November 2, 1994. The citation pertains to our "*ultra vires*/nonmineral lands" argument (*Appellant's Brief* at pp. 27-28), our "legislative approval/valid existing right" argument (*Reply Brief* at p. 6), and our "standing to protest" argument (*Reply Brief* at p. 12 n.15).

Sincerely yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: /s/ E. John Athens, Jr.
E. John Athens, Jr.
Assistant Attorney General

cc: Jeffrey P. Kehne, Esq. – By Facsimile Transmission

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

GOLDEN VALLEY ELECTRIC ASSOCIATION

IBLA 84-520 Decided March 25, 1985

Appeal from that part of a decision of the Fairbanks, Alaska, District Office, Bureau of Land Management, which declared a portion of transmission line right-of-way null and void. F-035083.

Reversed.

1. Alaska: Native Allotments – Rights-of-Way: Cancellation – Rights-of-way: Nature of Interest Granted

   A right-of-way for an electric transmission line issued pursuant to the Act of Mar. 4, 1911, over lands to which, at the time of issuance, an Alaska Native had an inchoate right through use and occupancy, cannot be defeated by subsequent determination of entitlement to an allotment for such lands, and the allotment must be made subject to the right-of-way. A decision holding such a right-of-way null and void must be reversed.

APPEARANCES: David H. Call, Esq., Fairbanks, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Golden Valley Electric Association has appealed from a decision of the Fairbanks, Alaska, District Office, Bureau of Land Management (BLM), dated March 29, 1984, which, in part, declared a portion of appellant's transmission line right-of-way, F-035083, null and void.

Effective July 11, 1966, BLM granted a 50-year, 100-foot wide right-of-way for a 138 KV transmission line to appellant, pursuant to the Act of March 4, 1911, *as amended*, 43 U.S.C. § 961 (1970) (repealed by section 706(a) of the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2793, effective October 21, 1976). The right-of-way grant was expressly made subject to "valid rights existing on the date of the grant." The transmission line is part of a line which runs from the substation at Nenana, Alaska, to the switchyard of appellant's mine-mouth power plant at Healy, Alaska.

In its March 1984 decision, BLM declared the portion of appellant's right-of-way which crosses the Native allotment of Jennie K. Irwin, F-1311, null and void. BLM noted that subsequent to the right-of-way grant Irwin had filed a Native allotment application for approximately 2 acres of land situated in the $S^1/_2$ $NE^1/_4$ sec. 36, T. 6 S., R. 8 W., Fairbanks Meridian, Alaska, alleging use and occupancy since June 10, 1962, pursuant to the Act of May 17, 1906, *as amended*, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1982), subject to pending applications). Although BLM held that the Native allotment application was not subject to automatic legislative approval pursuant to section 905 of the

Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634 (1982), it approved the application after adjudication, concluding that Irwin had satisfied the use and occupancy requirements of the Act of May 17, 1906. BLM further concluded that:

> Since the right-of-way grant F-035083, was made subject to valid existing rights and Jennie K. Irwin held the land at the time the right-of-way grant was issued, the grant is hereby declared null and void as to that portion within Jennie K. Irwin's Native allotment.

In its statement of reasons for appeal, appellant contends that, at the time Irwin was using and occupying the land, but prior to filing her allotment application, she conveyed a "right-of-way" to appellant[1] which should be recognized in any subsequent patent of the land to Irwin, citing *Willis v. City of Valdez*, 546 P.2d 570 (Alaska 1976). In effect, appellant argues that it was improper for BLM to declare its right-of-way null and void to the extent appellant had derived rights from Irwin's "valid existing rights." In the alternative, appellant contends that Irwin is estopped from denying the right-of-way granted to appellant prior to patent of the underlying land under the doctrine of after-acquired title.

Thus, appellant is not challenging Irwin's right to an allotment, but rather is appealing cancellation of its right-

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[1] Appellant states that Irwin had occupied the land "for four years before conveying the right-of-way to GVEA [(Golden Valley Electric Association)]." Appellant also states that, at the time of the conveyance, Irwin "had nearly completed the five-year period of occupancy required under the Native Allotment Act."

of-way. Accordingly, the issue raised is whether Irwin's rights stemming from her use and occupancy pursuant to the Native Allotment Act predating the right-of-way grant[2] require cancellation of appellant's right-of-way grant.

[1] Generally, an applicant will not be deemed to have a preference right to an allotment until "an allotment selection has been made by the filing of an acceptable application for public land open to such application and the applicant has used and occupied the land for not less than 5 years in his lifetime." *Arthur R. Martin*, 41 IBLA 224, 226 (1979), and cases cited therein. This preference right may entitle the applicant to preempt subsequently initiated claims, provided the applicant has complied with the statute. *Village and City Council of Aleknagik*, 77 IBLA 130 (1983).

It is the filing of a timely application together with completion of the requisite use and occupancy which causes the inchoate preference right to become a vested right. *United States v. Flynn*, 53 IBLA 208, 234, 88 I.D. 373, 387 (1981). In *Flynn*, we noted that the provision in section 8 of the Act of May 17, 1884, 23 Stat. 26 (1884), that Alaska Natives "shall not be disturbed in the possession of any lands actually in their use and occupation" was followed up by the Act of May 17, 1906, which provided for the more permanent protection of Native rights by granting a preference right upon the completion of 5 years use and occupancy and the filing of an application

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[2] We note that no issue has been raised here of subsequent abandonment of the allotment.

identifying the land sought (up to 160 acres). Thus, prior to the vesting of a preference right, an allotment applicant has a right not to be disturbed in his use and occupancy, which right can ripen into a preference right. Appellant's right-of-way grant was expressly subject to this right "existing on the date of the grant." *See Transwestern Pipeline Co. v. Kerr-McGee Corp.*, 492 F.2d 878 (10th Cir. 1974), *cert. denied*, 419 U.S. 1097 (1975). Moreover, Irwin's right of use and occupancy subsequently ripened into a preference right and BLM concluded in its March 1984 decision that she is entitled to an allotment. As noted previously, appellant has not challenged Irwin's right to an allotment under the Act of May 17, 1906. Indeed the right-of-way which appellant allegedly obtained from Irwin[3] supports a finding that Irwin's use and occupancy was at least potentially exclusive of others – one of the indicia of a qualifying Native allotment. *See* 43 CFR 2561.0-5(a).

However, the right generated by Irwin's use and occupancy of the land in 1966 at the time of appellant's right-of-way grant had not yet ripened into a vested right through the filing of a Native allotment application and the completion of the use and occupancy requirements. *see State of Alaska v. Thorson (On Reconsideration)*, 83 IBLA 237, 242-43, 91 I.D. 331, 334-35 (1984). The right of the allotment applicant was inchoate at the time – Irwin might have determined not to file an allotment application or might have abandoned the tract at issue and established her preference right in a different tract by use and occupancy thereof and filing an application therefor.

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[3] There is no copy of the right-of-way in the record.

Thus, we must conclude that at the time appellant sought its right-of-way from BLM Irwin had only an inchoate right, and BLM properly granted the right-of-way across the land in question.

The fact that Irwin's right subsequently ripened into a vested right and Irwin was determined to be entitled to an allotment cannot defeat the previously granted right-of-way. The allotment must be made subject to appellant's validly authorized right-of-way. BLM improperly declared that part of the right-of-way crossing the allotment null and void.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision declaring the right-of-way null and void is reversed.

/s/ C. Randall Grant, Jr.
C. Randall Grant, Jr.
Administrative Judge

We concur:

/s/ Gail M. Frazier
Gail M. Frazier
Administrative Judge

/s/ Bruce R. Harris
Bruce R. Harris
Administrative Judge

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
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GOLDEN VALLEY ELECTRIC ASSOCIATION
(ON RECONSIDERATION)

IBLA 84-520 Decided June 29, 1987

Petition for reconsideration of *Golden Valley Electric Association*, 85 IBLA 363 (1985), which reversed a decision of the Fairbanks District Office, Bureau of Land Management, declaring a portion of transmission right-of-way F-035083 null and void.

Reconsideration granted, prior Board decision vacated; Fairbanks District Office decision affirmed.

1. Alaska: Native Allotments – Rights-of-Way: Nature of Interest Granted

A right-of-way for electric transmission line issued, subject to valid existing rights, pursuant to the Act of March 4, 1911, over lands in the open and notorious possession of an Alaska Native cannot diminish the statutory preference right to a Native allotment. Although the preference right is inchoate prior to completion of the required period of qualifying use and occupancy and the filing of a timely application, when the preference right is vested it takes precedence over intervening applications filed subsequent to the commencement of use and occupancy by the Native and the right-of-way will be ineffective to authorize use of lands in

the allotment after vesting of the preference right.

Golden Valley Electric Association, 85 ~~IBLA~~ 363 1985), *vacated*, and *State of Alaska v. Albert*, 90 IBLA 14 (1985), *modified* to the extent inconsistent.

APPEARANCES: F. Christopher Bockmon, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management; Constance A. Cates, Esq., Fairbanks, Alaska, for Golden Valley Electric Association; Lance B. Nelson, Esq., Assistant Attorney General, Anchorage, Alaska, for the State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Counsel for the Bureau of Land Management (BLM) has petitioned the Board of Land Appeals for reconsideration of the decision in this case, cited as *Golden Valley Electric Association*, 85 IBLA 363 (1985). In that decision, the Board reversed a BLM decision declaring a portion of a right-of-way for power transmission line null and void. The BLM decision had invalidated that portion of the right-of-way which crossed land used and occupied by Jennie K. Irwin as a Native allotment on the ground the right-of-way was issued subject to valid existing rights and Irwin's use and occupancy pursuant to the Native Allotment Act, coupled with her subsequent timely filed application, precluded a right-of-way grant.

In support of the petition, BLM asserts that commencement of use and occupancy of the land by Irwin created a preference right in the land which could not be defeated by the subsequent right-of-way grant. This is so, BLM

contends, because Irwin filed a timely Native allotment application notwithstanding the fact the Native allotment application, had not been filed with BLM at the time the right-of-way was issued. BLM contends the Board decision is inconsistent with *Aguilar v. United States*, 474 F. Supp. 840 (D. Alaska 1979), and with a proper reading of the Board's decision in *United States v. Flynn*, 53 IBLA 208, 88 I.D. 373 (1981). Petitioner also cites the decision in *State of Alaska v. 13.90 Acres of Land*, 625 F. Supp. 1315 (D. Alaska 1985), issued since the Board's decision, for the proposition that Native use and occupancy creates an inchoate preference right which, once vested, relates back to the initiation of occupancy and takes preference over applications filed prior to the Native allotment application. In further support of reconsideration, BLM asserts it must deal with this issue in taking action to issue Irwin's Native allotment.

Counsel for appellant in this case, Golden Valley Electric Association, has opposed the request for reconsideration. Golden Valley argues BLM is not a proper party to the case with standing to request reconsideration, citing the regulation governing standing to appeal at 43 CFR 4.410(a). Further, Golden Valley opposes reconsideration on the ground Irwin had neither completed the required 5-years use and occupancy nor filed a Native allotment application at the time the right-of-way was issued. Thus, her rights at the time were still inchoate, as opposed to vested. Counsel distinguishes *State of Alaska v. 13.90 Acres of Land, supra*, on the ground the Native allotment right vested in that case when both filing of the

application and completion of the required use and occupancy occurred prior to issuance of the conflicting right-of-way.

The State of Alaska has petitioned the Board for leave to file a brief as amicus curiae in this case on reconsideration on the ground the issues presented here are involved in many cases in which the State is a party. Petitioner asserts that although the rights of Native allotment applicants are subject to the protection of due process of law, *Pence v. Kleppe*, 529 F.2d 135 (9th Cir. 1976), and thus protected against arbitrary abridgement, the Secretary is not deprived of discretion properly exercised in the adjudication of Native allotments, citing *State of Alaska*, 85 IBLA 196, 205 (1985). In opposing the BLM petition for reconsideration, the State cites the Board opinion in *Edward A. Nickoli*, 90 IBLA 273 (1986), and cases cited therein for the proposition that Native allotments may be made subject to public access routes as an exercise of the Secretary's discretion under the Native Allotment Act.

We find it appropriate to grant the petition for reconsideration in light of the precedents cited by petitioner. We also find it appropriate to accept the State's brief in this case as amicus curiae. As a preliminary matter, we find BLM has standing to petition for reconsideration under 43 CFR 4.21(c). Service on the Solicitor of the notice of appeal and statement of reasons is required of the appellant. 43 CFR 4.413. Any party served with the notice of appeal may file an answer, however, a failure to answer will not result in a default. 43 CFR 4.414. Although petitions for reconsideration by BLM are not ordinarily viewed with favor where counsel for BLM failed to file a brief prior to the decision of the Board,

reconsideration may be granted by the Board in its discretion where good cause is shown. 43 CFR 4.21(c). For reasons made plain in the following discussion, we find good cause has been shown and grant the petition for reconsideration.

[1] Upon careful review of the decision in *Aguilar v. United States, supra,* we must agree with the Solicitor that the court held that the Alaska Native Allotment Act of 1906, *as amended,* 43 U.S.C. § 270-1 through 270-3 (1970) (repealed December 18, 1971, subject to pending applications, 43 U.S.C. § 1617(a) (1982)), pursuant to which Irwin filed her Native allotment application, accorded the applicant a statutory preference right to an allotment of land commencing with the first use and occupancy of the land in a qualifying manner. Further, the preference right was not barred by the fact a Native allotment application was not filed for the land until after other disposition was made of the land. 474 F. Supp. at 845. It is true as we held in our prior decision that it is not until the completion of the required 5 years of use and occupancy coupled with the timely filing of a Native allotment application that the inchoate preference right becomes a vested preference right. *United States v. Flynn, supra.* However, we must also find that once the preference right becomes vested, the preference or preemption "relates back to the initiation of occupancy and takes preference over competing applications filed prior to the native allotment application." *State of Alaska v. 13.90 Acres of Land, supra* at 1319; *Aguilar v. United States, supra* at 845; *United States v. Flynn, supra* at 234, 88 I.D. at 387.

This result is also supported by Departmental precedent relating to Indian allotments outside Alaska. The

case of *Schumacher v. State of Washington*, 33 L.D. 454 (1905), involved an appeal by an Indian allotment applicant from rejection of his application on the ground the land was previously granted by statute to the State (which in turn had sold the land to a third party) prior to the filing of appellant's allotment application. The allotment applicant claimed bona fide settlement of the land, including the making of improvements, predating the grant to the State. Secretary Hitchcock found the Departmental history of protecting the possession of Indians on lands occupied and improved by them amounted to an appropriation or dedication of such lands which, when considered with the provisions of the Allotment Act under which the Indian allotment application was filed, caused lands occupied and applied for to be excepted from the grant to the State. *Id.* at 456. This was found to be true despite the fact the Indian allotment application was not filed until after the grant to the State and the subsequent sale to a third party:

> It is true that the Indian did not give notice of his intention to apply for an allotment of this land until after the State had made disposal thereof, but the purchaser at such sale was bound to take notice of the actual possession of the land by the Indian if, as alleged, he was openly and notoriously in possession thereof at and prior to the alleged sale, and that the act did not limit the time within which application for an allotment should be made.

Id. at 456, *quoted in Cramer v. United States*, 261 U.S. 219, 228 (1923).

We recognize, as pointed out by counsel for Golden Valley, that the Native allotment application reviewed in *State of Alaska v. 13.90 Acres of Land, supra,* was filed prior to the grant of the conflicting right-of-way, unlike the present case where the Native allotment application was not filed until after issuance of the right-of-way. However, we find no basis in the decision for restricting the court's holding to those cases where the Native allotment application was filed prior to approval of the conflicting application. Indeed, the court in *State of Alaska, supra,* while distinguishing our prior decision in *Golden Valley Electric Association, supra,* on this basis, expressly declined to address whether the case was correctly decided. 625 F. Supp. at 1319 n.4. Further, we find no basis for so restricting the court's holding in *Aguilar v. United States, supra.* The class of plaintiffs certified by the court was not restricted in this manner. *Id.* at 842. We also note the allotment application in *Schumacher, supra,* was not filed until after the statutory grant to the State and the subsequent sale of the tract to a third party.

We point out that to the extent prior use and occupancy by Natives afford any specific protections in the absence of an application to acquire title, it is "essential that acts of appropriation occur which would disclose to an observer on the ground that the land was under active development or use." *United States v. Flynn, supra* at 236-37, 88 I.D. at 389. It is clear from the record in this case, however, that Irwin was in open and notorious use and occupancy of the land prior to the right-of-way grant. *See Golden Valley Electric Association, supra* at 364 n.1.

The case of *Edward A. Nickoli, supra,* cited by the State in opposition to the petition for reconsideration, as well as the other precedents analyzed therein, are for the most part distinguishable from the case at hand. In *Nickoli,* reservation of a right of public access along a portion of the Iditarod National Historic Trail which crossed appellant's Native allotment was affirmed by the Board notwithstanding a BLM finding of qualifying use and occupancy by the applicant. According to the decision, use of the trail pre-dated the applicant's use and occupancy pursuant to the Native Allotment Act. Although the reservation was upheld as an exercise of the Secretary's discretion pursuant to the Native Allotment Act, the decision makes it clear that the reservation was specifically authorized by Act of Congress, section 7(h) of the National Trails System Act, 16 U.S.C. § 1246(h) (1982). 90 IBLA at 276. There is little doubt as to the authority of Congress to qualify the right to an allotment of the public lands pursuant to the Native Allotment Act prior to the vesting of the applicant's rights upon the filing of an application and the completion of the required use and occupancy. *See State of Alaska v. 13.90 Acres of Land, supra* at 1320. Reservation of a right-of-way for the Iditarod Trail in Native allotments was upheld on a similar basis in *Clarence Lockwood,* 95 IBLA 261 (1987).

The case of *Leo Titus, Sr.,* 89 IBLA 323 (1985), involved an appeal by a Native allotment applicant from a BLM decision reserving a public trail right-of-way across appellant's Native allotment. The Board set aside the BLM decision and remanded the case to ascertain whether the appellant had, in fact, intended to include the trail in his Native allotment application and, if so,

whether appellant had established substantial actual possession of the land at least potentially exclusive of others for that part of the Native allotment crossed by the trail. *Id.* at 332-34. In reviewing the question of whether a right-of-way may be reserved, the Board found that "where a valid existing right-of-way is found which does not impede a Native allotment applicant's claim to the subservient land the allotment may be made subject to the right-of-way." *Id.* at 335. The record in *Titus* disclosed a trail which pre-dated appellant's use and occupancy pursuant to his Native allotment claim. The Board recognized that use of this trail across the public lands as a highway might legally suffice to establish a right-of-way for this purpose under section 8 of the Act of July 26, 1866, *repealed*, Federal Land Policy and Management Act of 1976, section 706(a), 90 Stat. 2793 (formerly codified at 43 U.S.C. § 932 (1970)). 89 IBLA at 335-37.

These cases are distinguishable from the present case in that use of the land for right-of-way purposes preceded initiation of use and occupancy by the Native allotment applicant. Under the circumstances, we cannot find that they militate against reconsideration of our prior decision in this case. One of the cases cited in *Nickoli*, however, does offer language contrary to our analysis on reconsideration in this case. In *State of Alaska v. Albert*, 90 IBLA 14 (1985), we stated, citing *Golden Valley*, that although the Native applicant's use and occupancy preceded conflicting right-of-way grants to the State, the inchoate preference right (which did not become vested until the filing of the Native allotment application subsequent to the grant of the rights-of-way to the State) could not defeat the previously issued rights-

of-way. *Id.* at 21-22. Clearly, that statement must now be qualified for the reasons stated herein. Albert's inchoate preference right could defeat the previously issued rights-of-way *if* her use and occupancy was open and notorious at the time the right-of-way grants issued such that it would have disclosed to an observer on the ground that the land was under active development or use. *See United States v. Flynn, supra* at 236-37, 88 I.D. at 389.[1] For that reason, our statement in *Albert* is modified to the extent it is inconsistent with our present analysis.

Golden Valley's right-of-way was issued subject to "all valid rights existing on the date of the grant" (Exh. B to Response to Request for Reconsideration at 2). These rights included Irwin's inchoate preference right to a Native allotment established by her open and notorious use and occupancy at the time of the grant. Although this right did not become vested until later when Irwin completed the required use and occupancy and filed a timely application for Native allotment, the preference right relates back to the initiation of use and occupancy and preempts conflicting applications filed after that time, although prior to filing of the Native allotment application. Thus, on reconsideration we must affirm the decision of BLM declaring the right-of-way grant null and void to the extent it purported to grant a right-of-way over land in which Irwin held an inchoate preference

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[1] We observe that the BLM decision in *Golden Valley* and the position asserted on reconsideration apparently represent a shift in BLM's policy regarding the issuance of allotment certificates subject to rights-of-way. *See State of Alaska v. Albert, supra* at 19 n.7.

right which later became a vested right. Although Golden Valley apparently obtained the consent of Irwin to its use of a portion of her land for right-of-way purposes, the right-of-way granted by BLM to Golden Valley in 1966 pursuant to the Act of March 4, 1911, *as amended*, 43 U.S.C. § 961 (1970) (repealed by section 706(a) of the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2793, effective October 21, 1976), cannot authorize the use subsequent to the vesting of Irwin's right to a Native allotment for the lands.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is granted; the prior Board decision in this case, *Golden Valley Electric Association*, 85 IBLA 363 (1985), is vacated; and the decision of BLM is affirmed.

/s/ C. Randall Grant, Jr.
C. Randall Grant, Jr.
Administrative Judge

We concur:

/s/ Gail M. Frazier
Gail M. Frazier
Administrative Judge

/s/ Bruce R. Harris
Bruce R. Harris
Administrative Judge

United States Department of the Interior

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STATE OF ALASKA
GOLDEN VALLEY ELECTRIC ASSOCIATION

IBLA 88-64 Decided August 24, 1989

Appeals from a decision of the Kobuk District Office, Fairbanks, Alaska, Bureau of Land Management, declaring rights-of-way null and void in part. F-034891, F-39, and F-034779.

Affirmed.

1. Alaska: Native Allotments – Rights-of-Way: Nature of Interest Granted

   Where a Native initiates use and occupancy of certain lands in 1938, but prior to the filing of an allotment application, highway and power transmission rights-of-way are sought from and granted by BLM across such lands, subject to valid existing rights, the later filing of the allotment application vests the inchoate preference right arising from the use and occupancy, and that right relates back to the initiation of the use and occupancy, thereby taking precedence over the intervening rights-of-way applications. The subsequent legislative approval of the Native allotment in accordance with sec. 905(a) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a) (1982), precludes any inquiry into the Native's use

> and occupancy of the land, and the Native allotment is a valid existing right which is properly recognized by a declaration that the rights-of-way are null and void to the extent they cross lands within the allotment.

APPEARANCES: Linda L. Walton, Esq., Assistant Attorney General, Fairbanks, Alaska, for the State of Alaska; Constance Cates Ringstad, Esq., Fairbanks, Alaska, for Golden Valley Electric Association; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management; Judith K. Bush, Esq., Alaska Legal Services Corporation, Fairbanks, Alaska, for the heirs of Dinah Albert.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

The State of Alaska (State) and Golden Valley electric Association (GVEA) have filed separate appeals from a decision of the Kobuk District Office, Fairbanks, Alaska, Bureau of Land Management, (BLM), dated October 2, 1987, declaring rights-of-way F-034891, F-39, and F-034779 null and void in part, as to those portions of the rights-of-way that traverse parcels B and C of Native allotment F-035085, held by the heirs of Dinah Albert.[1] The BLM decision was based on this Board's decision in *Golden Valley Electric Association (On Reconsideration)*, 98

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[1] The State seeks review of the decision as it relates to highway rights-of-way F-034891 and F-39, while GVEA challenges the declaration that F-034779, a power transmission line right-of-way, is null and void in part. The two appeals were consolidated under one docket number, IBLA 88-64.

IBLA 203 (1987),[2] which modified a portion of an earlier Board decision, *State of Alaska v. Albert*, 90 IBLA 14 (1985), which had indicated that the Albert Allotment was properly made subject to rights-of-way F-034891 and F-39.

Dinah Albert filed a number of Native allotment applications, all designated by BLM as F-035085. In 1975, BLM approved F-035085, and in a February 5, 1975, request for survey it described the approved lands as

> Parcel B and Parcel C in Section 14, T. 4 S., R. 8 W., Fairbanks Meridian, comprising that area originally surveyed as Lots 3 and 4 (two separate islands) but now one island [in the Tanana River] according to U.S.G.S. Map C-5; and Parcel D in T. 5 S., R. 6 W., Fairbanks Meridian, Section 6.

Prior to the filing of Albert's Native allotment applications in 1967 and 1968 for the lands (Parcel B and Parcel C, respectively) which are involved in the present case,[3] the State filed applications for and received highway rights-of-way F-034891 and F-39 across lot 4, and GVEA received right-of-way F-034779 for a power transmission line across lot 3 and lot 4.

The highway rights-of-way were granted pursuant to the Federal Highway Act, 23 U.S.C. § 317 (1982), and

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[2] This decision is the subject of judicial review in *Golden Valley Electric Association v. Secretary of the Interior*, No. F 87-64 (D.C. Alaska, filed Dec. 12, 1987).

[3] Although Albert filed an allotment application for an island described as "Tract #2 * * * in the center of the Tanana River" in January 1966, she thereafter relinquished that application in April 1966.

were made subject to valid existing rights. The State secured these rights-of-way in order to construct a highway bridge on the island. The bridge is presently located on the island. The decision appealed from states that at the time rights-of-way F-39 and F-034891 were granted they passed through the 20.36-acre island, designated as Parcel C (lot 4).

BLM issued the power transmission line right-of-way to GVEA on July 11, 1966, pursuant to the Act of March 4, 1911, *as amended*, 43 U.S.C. § 916 (1970), repealed by section 706(a) of the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2739, effective October 21, 1976. The grant was made subject to valid existing rights. BLM's decision states that when right-of-way F-034779 was granted, it crossed the 6.70-acre island, designated as Parcel B (lot 3), as well as Parcel C.

Subsequent to the 1975 allotment approval, the State, in December 1982, filed a private contest complaint challenging the allotment and seeking to establish its continuing entitlements to its rights-of-way. Following an evidentiary hearing, Administrative Law Judge Michael L. Morehouse issued a decision on May 7, 1984, finding that Dinah Albert had satisfied the allotment requirements and concluding that a Native Allotment Certificate should issue, but that it should be subject to the State's rights-of-way.

Both parties appealed Judge Morehouse's decision. In *State of Alaska v. Albert, supra*, the Board dismissed the appeal of the State on jurisdictional grounds because the State's notice of appeal had not been timely filed. The

Board also ruled that Judge Morehouse should have dismissed the contest as having been untimely filed under section 905(a)(5) of the Alaska National Interest Lands Conservation Act (ANILCA), 42 U.S.C. § 1634(a)(5) (1982). Under that section, which established a time limit of 180 days from December 2, 1980, for raising objections to the approval of designated Native allotment applications, the State could have filed a private contest or a protest. The State did not file its private contest until December 1982, after the expiration of that statutory time period. The Board ruled that the State was barred from challenging the validity of Albert's allotment.

In dismissing the appeals, the Board stated:

> We note that it is unlikely the BLM will take action adverse to the State's interest in these rights-of-way. The record facts show that although Albert's use and occupancy in lot 4 commenced in 1938, at the time the State applied for and received its right-of-way grants (1965 and 1966), Albert had only an inchoate preference right to an allotment, her allotment application for lot 4 being filed in 1968. Her inchoate preference right did not become a vested right until the filing of her application. *See United States v. Flynn*, 53 IBLA 208, 234, 88 I.D. 373, 387 (1981). The vesting of the allotment and the subsequent approval of the allotment cannot defeat the previously granted State rights-of-way. *See Golden Valley Electric Association*, 85 IBLA 363, 365 (1985). If for some reason BLM were to cancel the State's right-of-way grants, the State would have the right to appeal to this Board. [Footnotes omitted].

Id. at 21-22.

BLM's October 2, 1987, adjudication of the three rights-of-way as null and void in part is based on the Board's reconsideration of the *Golden Valley Electric Association* case, relied on by the Board in *Albert*. In *Golden Valley Electric Association (On Reconsideration)*, 98 IBLA 203 (1987), we vacated our earlier decision in which we held that a right-of-way for an electric transmission line over lands to which, at the time of issuance, an Alaska Native had an inchoate preference right through use and occupancy, could not be defeated by a subsequent determination of entitlement to an allotment for such lands, and that the allotment was subject to the right-of-way. In reversing that holding, we affirmed the BLM decision invalidating a portion of a right-of-way for a transmission line on the ground that the right-of-way had been issued subject to the valid existing rights of a Native allotment applicant whose use and occupancy, coupled with a timely filed Native allotment application, precluded the right-of-way grant, even though the completion of the 5-years' use and occupancy and the filing of the application post-dated the grant of the right-of-way. In combination, the elements of requisite use and occupancy and a timely filed application result in the vesting of an allotment applicant's inchoate preference right. *United States v. Flynn*, 53 IBLA 208, 234, 88 I.D. 373, 387 (1981). Once the preference right to an allotment vests, that right relates back to the initiation of occupancy and takes precedence over competing applications filed prior to the allotment application. *State of Alaska v. 13.90 Acres of Land*, 625 F. Supp. 1315, 1319 (D. Alaska 1985), *aff'd sub nom. Etalook v. Exxon Pipeline Co.*, 831 F.2d 1440 (9th Cir. 1987);

Aguilar v. United States, 474 F. Supp. 840, 845 (D. Alaska 1979).

Finally, in *Golden Valley Electric Association (On Reconsideration), supra* at 207, we modified our decision in the *Albert* case by stating that Albert's inchoate preference right could defeat the State's rights-of-way if her use and occupancy of the land was open and notorious at the time of issuance of the rights-of-way.

In the decision now before us, BLM found that Albert had used her allotment continuously from 1938 to 1967, and that her use and occupancy was open and notorious at the time the three rights-of-way were issued.

The State and GVEA contend that Albert's use and occupancy was not open and notorious and therefore insufficient to provide notice of her claim, and that her rights so obtained were rendered invalid by periods of nonuse. Appellants contend that the allotment should be made subject to their rights-of-way. In the alternative, GVEA requests that the matter be remanded for a hearing to determine whether Albert's use and occupancy was sufficiently open and notorious to defeat its right-of-way.

BLM contends that it has the authority and responsibility to declare a right-of-way invalid where it determines that a Native allotment is the superior interest. That superior interest, BLM argues, vested upon the filing of Albert's applications for Parcels B and C and related back to the commencement of her use and occupancy of the land in 1938. BLM contends that the allotment cannot be made subject to the rights-of-way because ANILCA legislative approval of the allotment had the

effect of removing from BLM the administrative jurisdiction to adjudicate conflicting claims to the land. Both BLM and Albert argue that the doctrine of administrative finality bars readjudication of Albert's qualifying use and occupancy.

BLM asserts that the issue before the Board is whether applicable law requires that the three rights-of-way be declared null and void in part, and not whether Albert's use and occupancy served to give appellants notice of her allotment.

[1] Whether Albert's use and occupancy of the land was sufficient to qualify for an allotment under the regulations in 43 CFR Part 2560 is not an issue in this case. BLM approved Albert's allotment in 1975. The Allotment Certificate did not issue at that time because of a survey backlog. However, on December 2, 1980, Congress provided in section 905 of ANILCA, 43 U.S.C. § 1634 (1982), for statutory approval of specified allotment applications subject to the right of the State and others to file protests on certain grounds within a specified period. As we observed in *State of Alaska v. Albert, supra,* the State and others were specifically invited to protect their interests within 180 days of the enactment of ANILCA. 43 U.S.C. § 1634(a)(5)(B) and (C) (1982). Section 905(a) of ANILCA, 43 U.S.C. § 1634(a) (1982), was intended to promote allotment finality and thereby conveyance finality. S. Rep. No. 413, 96th Cong., 2nd Sess. 237, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5181. The intent of that section would be frustrated by allowing the State or GVEA to come forward after the statutorily imposed time limit and challenge those allotments legislatively approved by ANILCA. Section 905(a) of ANILCA was notice to the

world that specified allotment applications would be approved after the passage of 180 days without protest. Appellants' attempts to contest the sufficiency of Albert's use and occupancy for purposes of approval of the allotment under the parameters of 43 CFR Part 2560 are barred by the expiration of the statutory challenge period. *State of Alaska v. Albert, supra* at 20. Legislative approval had the effect of removing the Department's general authority to reexamine the question of entitlement or further condition the scope of the grant. *Eugene Witt*, 90 IBLA 265, 270 (1986).

In their arguments related to "open and notorious" use and occupancy, appellants focus on the Board's statement in *Golden Valley Electric Association (On Reconsideration), supra*, that if Albert's use was open and notorious it could defeat right-of-way grants. Appellants then assert that Albert's use and occupancy was not open and notorious at the time of issuance of their rights-of-way. Appellants argue that we should make a finding of fact in their favor on this issue. In support of their argument, each has provided a copy of the transcript of the 1983 hearing in the State's private contest claiming that it supports their position that Albert's use and occupancy was not open and notorious at the time their rights-of-way issued. In the alternative, GVEA asserts that, at a minimum, a further hearing should be conducted into whether or not Albert's use and occupancy was open and notorious.

The question presented is whether legislative approval allows any further examination into the circumstances of Albert's use and occupancy of the land in order to determine whether reservations for the rights-of-way

may be included in the allotment. We find that it does not.

Our concluding rationale in *Golden Valley Electric Association (On Reconsideration), supra,* was as follows:

> Golden Valley's right-of-way was issued subject to "all valid rights existing on the date of the grant" (Exh. B to Response to Request for Reconsideration at 2). These rights included Irwin's inchoate preference right to a Native allotment established by her open and notorious use and occupancy at the time of the grant. Although this right did not become vested until later when Irwin completed the required use and occupancy and filed a timely application for Native allotment, the preference right relates back to the initiation of use and occupancy and preempts conflicting applications filed after that time, although prior to filing of the Native allotment application. Thus, on reconsideration we must affirm the decision of BLM declaring the right-of-way grant null and void to the extent it purported to grant a right-of-way over land in which Irwin held an inchoate preference right which later became a vested right.

Id. at 208.

The valid existing rights analysis of the *Golden Valley* case on reconsideration is applicable in this case, with the exception that, unlike in *Golden Valley,* the allotment in this case has been legislatively approved. In the *Golden Valley (On Reconsideration)* case, the Board concluded that there was open and notorious use and occupancy of the land prior to the right-of-way grant and a subsequent filing of the allotment application which resulted in the

vesting of the inchoate preference right that related back to initiation of occupancy. Despite our statement in that case regarding the *Albert* decision, we now believe that legislative approval precludes any additional inquiry of any kind into the facts of Albert's use and occupancy of the land. Under controlling case law, Albert's allotment relates back to the initiation of her occupancy of the land, which as a matter of record was 1938; therefore, only a valid existing right could survive her allotment. The rights-of-way, approved in the mid-1960's, cannot be considered valid existing rights since they did not come into existence until long after initiation of Albert's allotment. Those rights-of-way, however, each were issued subject to valid existing rights. The allotment, under the relation back doctrine, is such a right. For that reason, we are compelled to the conclusion that legislative approval of the allotment necessitated BLM's action in declaring the rights-of-way null and void to the extent they cross allotment F-035085.[4]

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[4] While appellants have urged that the allotment should issue subject to the rights-of-way, they have demonstrated no authority under which BLM would be required to so limit the allotment. As we noted in *Golden Valley Electric Association (On Reconsideration), supra* at 207 n.1, and in *State of Alaska v. Albert, supra* at 19 n.7, BLM has apparently changed its policy of issuing allotments subject to rights-of-way. Under the Native Allotment Act the Secretary is afforded discretion, but not unfettered discretion, in adjudicating allotment applications. *Pence v. Kleppe*, 529 F. 2d 135, 140 (9th Cir. 1976). In a case such as this, the Secretary's discretion is circumscribed by the controlling case law. We note that in *Degnan v. Hodel*, No. A87-252 Civil (Feb. 15, 1989), the Alaska District Court reversed *Clarence Lockwood*, 95 IBLA 261 (1987), where the Board had upheld the reservation of a right-of-way for a segment of the Iditarod Trail across Native

Even though the above discussion resolves these appeals, we will briefly address other arguments raised by appellants. The State argues that BLM was without jurisdiction to declare its rights-of-way null and void in part and that to do so was an abuse of discretion depriving the State of due process and property without just compensation. GVEA joins in the due process argument. In *Golden Valley Electric Association (On Reconsideration), supra,* we upheld BLM's action cancelling a right-of-way in similar circumstances. Clearly, where BLM issues a right-of-way subject to valid existing rights and subsequently it is determined that such rights exist, BLM has the jurisdiction to declare the right-of-way null and void.[5]

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allotments. The court found that once the Secretary had granted interim approval of the allotments, thereby conveying equitable title to the allotment applicants, he "was thereafter without power to diminish that title by reserving rights-of-way across the allotment lands under the [National Trails System Act]" (Order at 8).

[5] In a letter dated Aug. 23, 1988, the State alleges that the "land which is the subject of the appeal was conveyed to the State by [quitclaim deed of] the Department of Commerce in 1959," a conveyance which "would appear to deprive the Department [of the Interior] of jurisdiction over the subject matter of the appeal." The letter refers to a deed describing a section of the highway conferred as follows: "From the junction of FAP Route 61 and 62 at Fairbanks via Ester to the end of south approach to Tanana River at Nenana." The State asserts that this description implies that the right-of-way extends across the river.

Under section 21 of the Alaska Omnibus Act of June 24, 1959, 73 Stat. 141, 145, the Secretary of Commerce was required to transfer to the State "all lands or interests in lands * * * owned, held, administered by, or used by the Secretary in connection with the activities of the Bureau of Public Roads in

In this case due process considerations have been satisfied. BLM's October 2, 1987, decision gave appellants notice that BLM was declaring the rights-of-way null and void in part and stated the grounds therefor. Appellants were provided the right to appeal to this Board, thereby satisfying the requirement of the right to be heard. *See Santa Fe Pacific Railroad Co.*, 90 IBLA 200, 220 (1986).

The State alleges that cancellation of its rights-of-way is contrary to 43 U.S.C. § 1166 (1982), which provides that "[s]uits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents." As we stated in *State of Alaska v. Albert*, *supra* at 21, a right-of-way grant is not an application for title and cannot be considered as passing title. Therefore, the statute has no application. *See Kern River Co. v. United States*, 257 U.S. 147 (1921).

Finally, the State contends that estoppel should apply to prevent challenges to its rights-of-way. The State asserts that it relied in good faith on the issuance of its rights-of-way, receiving no notice from either BLM or Albert that there would be a problem with those rights-of-way. Among other factors, a crucial misstatement in an official decision is an express precondition for invoking estoppel. *Cyprus Western Coal Co.*, 103 IBLA 278 (1988),

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Alaska." There is no clear indication that the island, or islands, in question in the Tanana River were owned, held, administered by, or used by the Department of Commerce, such as to have been part of the 1959 conveyance. Moreover, the State's applications for rights-of-way across those lands, filed with BLM in 1965 and 1966, are inconsistent with any claim by the State of ownership dating from 1959.

and cases there cited. There was no affirmative misrepresentation or concealment of facts by Departmental officials. Again, as previously discussed, the rights-of-way were issued subject to valid existing rights.

To the extent that appellants have made other arguments that have not been expressly discussed, they have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

/s/ Bruce R. Harris
Bruce R. Harris
Administrative Judge

I concur:

/s/ Wm. Philip Horton
Wm. Philip Horton
Chief Administrative Judge

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
Interior Board of Land Appeals
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STATE OF ALASKA
DEPARTMENT OF TRANSPORTATION AND
PUBLIC FACILITIES

IBLA 90-321 Decided October 25, 1994

Appeal from a decision of the Alaska State Office, Bureau of Land Management, modifying in part a prior decision and holding right-of-way A-067674 null and void in part. AA-6714.

Reversed.

1. Alaska: Native Allotments – Evidence: Presumptions

A Native allotment application bearing a BLM date-stamp of Dec. 27, 1971, and a BIA certification of Dec. 22, 1971, will be regarded as timely filed prior to the Dec. 18, 1971, deadline imposed by sec. 18(a) of ANSCA [sic], 43 U.S.C. § 1617(a) (1988), where the record supports a finding that the application was timely filed with BIA. An affidavit of an individual who states that she assisted the applicant in completing the application on Dec. 31, 1970, and regularly mailed such applications within a few weeks of completion; evidence that applications were not routinely date-stamped upon receipt by BIA; and the fact that the application bears a metes and bounds description of the allotment

parcel, coupled with the fact that such descriptions were generally prepared by BIA officials, supports a finding that the application was timely filed.

2. Alaska: Native Allotments

Prior to passage of sec. 905(a)(3) of ANILCA, 43 U.S.C. § 1634(a)(3) (1988), lands containing valuable deposits of gravel were considered to be mineral lands unavailable for Native allotment. The preference right which vests upon the completion of 5 years of qualifying use and occupancy and the timely filing of an application for a Native allotment will not relate back to the initiation of use and occupancy to preempt an intervening material site right-of-way for gravel when mineral lands were unavailable for allotment at the time.

3. Alaska National Interest Lands Conservation Act: Native Allotments – Alaska: Native Allotments

Statutory approval of a Native allotment pursuant to sec. 905 of ANILCA, 43 U.S.C. § 1634 (1988), is subject to valid existing rights, including a prior material site right-of-way issued for mineral lands. A decision declaring such a right-of-way null and void to the extent the lands are embraced in a Native allotment is properly reversed on appeal.

APPEARANCES: E. John Athens, Jr., Esq., Office of the Attorney General, State of Alaska, Fairbanks, Alaska, for appellant; James J. Benedetto, Esq., Anchorage, Alaska, for Mary Sanford; Roger L. Hudson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The State of Alaska, Department of Transportation and Public Facilities, has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated March 27, 1990, modifying in part a BLM decision of February 5, 1985, and holding right-of-way A-067674 null and void in part. The prior BLM decision had held that Native allotment application AA-6714 was legislatively approved by section 905(a)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(1) (1988), *subject to* right-of-way A-067674. At issue in the instant appeal is whether BLM properly concluded in the most recent decision that right-of-way A-067674 was null and void insofar as it described lands within the Native allotment.

Mary Sanford signed Native allotment application AA-6714 on December 31, 1970, seeking an allotment of approximately 160 acres of land in protracted secs. 9 and 10, T. 7 N., R. 2 E., Copper River Meridian.[1] This application was made pursuant to the Act of May 17, 1906, *as amended*, 43 U.S.C. § 270-1 (1970), repealed effective December 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (1988), subject to applications pending on that date. Sanford alleged use and occupancy of the lands sought commencing in May 1965.

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[1] Lands within Native allotment application AA-6714 were surveyed in July 1988, and this survey (U.S. Survey 9637) was filed in March 1990. The survey fixed the allotment approximately 920 feet west of the boundaries previously relied upon by appellant.

On December 22, 1971, Roy Peratrovitch, the Anchorage Area Superintendent, Bureau of Indian Affairs (BIA), signed application AA-6714 certifying that Mary Sanford was a "native entitled to an allotment" and that she "had occupied, marked, and posted the lands" claimed by her. BIA forwarded this application to BLM, as evidenced by a datestamp on the front of the application indicating receipt by BLM on December 27, 1971.

Previous to the filing of Sanford's allotment application, BLM issued right-of-way A-067674 to the State on July 26, 1966, to serve as a mineral material source for highway construction. The grant was made pursuant to the Act of August 27, 1958, 23 U.S.C. § 317 (1988). An application for right-of-way A-067674 had been filed by the State on April 28, 1966.

Although the bulk of the State's appeal addresses BLM's holding that right-of-way A-067674 was null and void in part, the State first focusses upon the jurisdiction of this Department to consider Native allotment application AA-6714. The State charges that this application was not timely filed and that, therefore, it must be rejected as a matter of law. The State argues that the fact BLM recognized this application as legislatively approved by decision of February 5, 1985, does not now preclude appellant from raising the issue that the Department is without jurisdiction.

In support, the State correctly notes that the deadline for filing Native allotment applications was December 18, 1971, and that BLM did not receive application AA-6714 until December 27, 1971. Appellant also cites with approval Assistant Secretary Horton's interpretation of

the savings clause for pending applications found at section 18(a) of ANCSA, quoted by the Board in *Ouzinkie Native Corp. v. Opheim*, 83 IBLA 225, 228 (1984):

> This phrase [pending before the Department on December 18, 1971] is interpreted as meaning that an application for a Native allotment must have been on file in any bureau, division, or agency of the Department of the Interior on or before December 18, 1971. The Department has no authority to consider any application *not* filed with any bureau, division, or agency of the Department of the Interior on or before said date. Evidence of pendency before the Department of the Interior on or before December 18, 1971, shall be satisfied by any bureau, agency, or division time stamp, the affidavit of any bureau, division, or agency officer that he received said application on or before December 18, 1971, and may also include an affidavit executed by the area director of BIA stating that all applications transferred to BLM from BIA were filed with BIA on or before December 18, 1971. [Emphasis in original.]

Appellant argues that no datestamp or affidavit satisfying these specific requirements is present in the record.

In response, Sanford offers the affidavit of Lillian Boston, which states that Boston personally assisted Mary Sanford and others in preparing Native allotment applications and witnessed Sanford's signature on December 31, 1970. Boston further states that she was aware in 1970 that the Native Allotment Act might be repealed by future legislation and that, therefore, time was of the essence in delivering allotment applications to BIA in

Anchorage as soon as possible. It was her normal practice, Boston says, to mail completed applications to BIA Anchorage on a regular basis.

Although she did not have any recollection of when Mary Sanford's application was mailed, Boston states that her best estimate is that "if the application was signed on December 31, 1970, that it would have been no more than a few weeks before the application was mailed to BIA in Anchorage."

[1] We find the Boston affidavit to evidence a *practice*, akin to a business practice, that completed applications were mailed by Boston to BIA within a few weeks of completion. *See* 1 McCormick on Evidence 829 (4th ed. 1992). Although the Boston affidavit does not fall within the examples described in the Horton memorandum, this memorandum is not exhaustive and does not preclude reliance on other evidence. *Heirs of Linda Anelon*, 101 IBLA 333, 337 (1988).

Case law makes clear that a presumption exists that mail properly addressed, stamped, and deposited in an appropriate receptacle is duly delivered. *Donald E. Jordan*, 35 IBLA 290, 294 (1978). That such mail "reached its destination at the regular time, and was received by the person to whom it was addressed" is within the presumption. *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884); *Legille v. Dann*, 544 F.2d 1, 5 (D.C. Cir. 1976). The fact that application AA-6714 bears BIA's certification is evidence that the application was received by BIA, an agency of the Department. The evidence of mailing, coupled with the presumption of receipt in the normal course, is supportive of a finding that the application was timely filed.

The cases are clear that BIA did not consistently datestamp arriving applications. *See Myrtle Jaycox*, 64 IBLA 97, 99 n.2 (1982). Deposition testimony of Audrey Tuck, offered by Sanford, confirms that a datestamp was not consistently used by BIA when an "avalanche" of applications began arriving in October 1970.[2] Thus, the lack of a BIA datestamp does not rebut the existence of a timely filing.

The record supports a finding that Boston mailed application AA-6714 early in 1971 and that it was timely received, albeit not datestamped, by BIA well prior to the deadline. Supporting this conclusion is the presence on the application of a legal description of the allotment parcel customarily completed by BIA. *See Nora L. Sanford (On Reconsideration)*, 63 IBLA 335, 337 (1982). Sanford's parcel was described by metes and bounds, a method requiring considerable detail. Further evidence is offered by the fact that BIA, despite the great number of applications filed near the deadline, certified Sanford as a qualified Native only 4 days after the deadline.

The State requests that the Board order an evidentiary hearing if it determines that an issue of fact exists regarding the timeliness of application AA-6714. It is the policy of this Board to order such a hearing when an

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[2] Answer of Appellee Mary Sanford, Feb. 3, 1992, Exh. C at 15. Appellant objects to receipt of this deposition in evidence on the ground that it was not a party to the proceeding at which the deposition was taken and hence was not present to participate in the deposition. While the lack of opportunity to cross examine the deponent is a valid consideration in assessing the weight of the evidence, we reject appellant's contention that the deposition must be rejected on this basis.

issue of material fact exists, but we can find no useful purpose for a hearing in the instant case. Although appellant contends that application AA-6714 was untimely, its basis for so concluding is the presence of BLM's date-stamp on the front of the application indicating receipt on December 27, 1971. No party disputes that BLM (as opposed to BIA) did not receive the application prior to the deadline, and no party disputes the fact that BIA did not indicate the date of its receipt of the application. To convene a hearing to adduce evidence as to such facts is to engage in an exercise in futility. The State's request for hearing is not accompanied by an offer of proof, and it is hereby denied in the absence of sufficient justification.

Addressing the merits of BLM's decision holding right-of-way A-067674 null and void in part, the State points out that this right-of-way was granted on July 26, 1966, for "public lands" described therein subject to "all valid rights existing on the date of the grant." Public domain lands are defined in the grant to include lands "reserved or withdrawn for specific purposes, entered, selected, occupied and/or settled, and leased," appellant notes.

The State contends that as of July 26, 1966, Sanford had no valid existing rights. Even assuming that she commenced use and occupancy prior to this date, appellant argues, Sanford's claim to the land was inchoate and nonvested at this critical date. This conclusion follows because Sanford had yet to file a Native allotment application and because a mere preference right did not afford any protection against grants by the United States for public purposes, the State contends.

The State takes issue with the finding of BLM that the preference right to a Native allotment gained upon filing an application after completion of the requisite use and occupancy related back to the date of initial occupancy shown on the allotment application to defeat an intervening right-of-way grant. In particular, appellant challenges our decision in *Golden Valley Electric Association (On Reconsideration)*, 98 IBLA 203 (1987) [*GVEA (On Recon.)*], and our reliance on the decisions in *State of Alaska v. 13.90 Acres of Land*, 625 F. Supp. 1315 (D. Alaska 1985), *Aguilar v. United States*, 474 F. Supp. 840 (D. Alaska 1979), and *Schumacher v. State of Washington*, 33 L.D. 454 (1905), cited by the Board. The State contends that under the Act of February 8, 1887, 24 Stat. 388, involved in the *Schumacher* case, Indian occupancy caused the land to be appropriated and unavailable for disposition by the United States. This is asserted to be distinguishable from the Native Allotment Act where mere occupancy without the filing of an application does not establish a valid existing right. Further, it is noted that the claim of the State of Washington in *Schumacher* was made subject to the claims of settlers by terms of the authorizing statute. The *Aguilar* case is distinguished by appellant on the ground that the State in that case was in the position of a conflicting entryman in that the Statehood Act required that the land selected be vacant.

The State further argues that legislative approval of application AA-6714 by ANILCA does not preclude inquiry into the sufficiency of Sanford's use and occupancy of lands within right-of-way A-067674. Gross unfairness would result if appellant is required to have protested application AA-6714 within the 180-day period

provided by section 905(a)(5) of ANILCA, 43 U.S.C. § 1634(a)(5) (1988), appellant charges. During the protest period, right-of-way A-067674 was a valid existing right, the State argues, and section 905(a)(1) expressly made legislative approval "subject to valid existing rights." Moreover, the Board has previously acknowledged in *Ahtna, Inc.*, 100 IBLA 7, 15 (1987), that there is "nothing in the record which shows [Sanford's] open and notorious use and occupancy" of allotment AA-6714 prior to the filing and approval of material source A-067674 (Appellant's Reply to Answer of BLM, Mar. 9, 1992, at 26).[3]

The decision of BLM in this case was expressly premised on this Board's decision in *State of Alaska*, 110 IBLA 224 (1989).[4] In that case, Native use and occupancy began in 1938, well prior to the State's receipt in 1966 of rights-of-way issued pursuant to 23 U.S.C. § 317 (1988). Native allotment applications were filed in 1967 and 1968. As here, the State urged that the Native allotment should be made subject to the rights-of-way or, in the alternative, that a hearing be ordered to determine whether Native use and occupancy was sufficiently open and notorious to defeat the State's rights-of-way. The analysis in *State of Alaska* and the BLM decision in the instant appeal rely

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[3] The *Ahtna* case, in which all the parties to the present appeal participated, involved the question of the proper disposition of funds escrowed from the sale of gravel excavated from an extension (Pit 18) of the material site right-of-way (A-067674) at issue in this appeal.

[4] *Appeal dismissed, State of Alaska v. Lujan*, Civ. No. F90-006 (D. Alaska May 18, 1993); *appeal filed*, No. 93-35684 (9th Cir. July 16, 1993).

upon the concept of relation back. Upon a Native's qualifying use and occupancy *and* the timely filing of a Native allotment application, a preference right to the lands so used and occupied vests in the Native. *United States v. Flynn*, 53 IBLA 208, 234, 88 I.D. 373, 387 (1981); *see GVEA (On Recon.)*, 98 IBLA at 205. Once the preference right to an allotment vests, that right *relates back* to the initiation of occupancy and takes precedence over competing applications filed prior to the allotment application. *State of Alaska*, 110 IBLA at 227.

The Board's decision in *State of Alaska* went further than prior Board decisions. In holding that Native rights related back to the commencement of use and occupancy to take precedence over applications filed prior to the Native allotment application, both *Flynn* and *GVEA (On Recon.)* found it essential "that acts of appropriation occur which would disclose to an observer on the ground that the land was under active development or use." *United States v. Flynn, supra* at 236-37, 88 I.D. at 389; *GVEA (On Recon.)*, 98 IBLA at 206 ("open and notorious use and occupancy of the land prior to the right-of-way grant"). In *State of Alaska* we held that the legislative approval by section 905 of ANILCA of Native allotments pending before the Department on or before December 2, 1980, barred any further adjudication of the sufficiency of the allotment applicant's use and occupancy of the land to preclude issuance of a right-of-way applied for after initiation of Native use of the lands in the allotment. 110 IBLA at 228-229. On this rationale, we affirmed cancellation of the right-of-way to the extent of the conflict with the Native allotment.

[2, 3] We decline the invitation to reexamine our holdings in *State of Alaska* and *GVEA (On Recon.)* because we find those cases to be distinguishable. The rights-of-way in *State of Alaska* were secured for a highway bridge and for a power transmission line. The right-of-way in *GVEA (On Recon.)* was similarly issued for a power transmission line. In contrast, the State right-of-way (A-067674) in the present case was issued for a mineral material site for extraction of gravel for construction of the Tok highway. *See Ahtna, Inc., supra* at 8-9. In that case we noted that the Alaska Native Allotment Act expressly limited Native allotments to "nonmineral" land. Act of May 17, 1906, ch. 2469, 34 Stat. 197; *see* 43 CFR 2561.0-3. In the *Ahtna* case we carefully examined the question of whether lands embracing deposits of gravel are properly deemed mineral in character:

> [W]e must conclude that prior to passage of section 905(a)(3) of ANILCA in 1980, 43 U.S.C. § 1634(a)(3) (1982), lands valuable for gravel were considered to be mineral lands not available for disposition under the Alaska Native allotment Act and the regulations promulgated pursuant thereto. A BLM mineral report dated July 5, 1973, prepared by H. L. Edwards, a mining engineer, appearing in the Native allotment case file, concluded that the southern portion of the Native allotment, including land embraced in the State's material site and the subsequent Pit 18 extension, was mineral in character. The report concluded that these lands "possess mineral materials in such quantity and quality as to be designated mineral in character" and, further, that a "market exists now for the material." Mineral Report at p. 4. This report was the basis

> for the December 15, 1975, notice to Sanford's counsel advising that a portion of her Native allotment claim had been determined to be mineral in character due to the presence of gravel.
>
> Thus, prior to the passage of ANILCA in 1980, Sanford would not have been able to obtain an allotment for the land embracing the gravel deposit. * * * Sanford's Native allotment application was subject to rejection for the lands embraced in the gravel deposit as she was advised in the December 15, 1975, notice for [sic] BLM. If adjudication had proceeded in its proper sequence, Sanford's application would have been rejected as to the gravel lands prior to the material sale to the State.

100 IBLA at 17-18.

Accordingly, we find that the allotment applicant's preference right to an allotment cannot as a matter of law relate back to the initiation of use and occupancy with respect to the mineral land located within the State's mineral material site right-of-way. With respect to statutory approval of the allotment pursuant to section 905(a)(1) of ANILCA, such approval is subject to "valid existing rights." While section 905(a)(3) of ANILCA defined "nonmineral" lands to include lands valuable for gravel, this provision did not retroactively invalidate the material site right-of-way. Consequently, there is no basis for finding that the State material site right-of-way issued in 1966 was preempted and is null and void.[5]

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[5] We note that certain procedural motions have been filed late in these proceedings regarding efforts to strike certain pleadings filed on behalf of parties. Although the Board does

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

/s/ C. Randall Grant, Jr.
C. Randall Grant, Jr.
Administrative Judge

I concur:

/s/ Gail M. Frazier
Gail M. Frazier
Administrative Judge

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not generally "strike" pleadings filed in cases and, hence, the motion is denied, we have considered the objection as a motion in opposition to the pleading.

23 U.S.C. § 317.

(a) If the Secretary determines that any part of the lands or interests in lands owned by the United States is reasonably necessary for the right-of-way of any highway, or as a source of materials for the construction or maintenance of any such highway adjacent to such lands or interests in lands, the Secretary shall file with the Secretary of the Department supervising the administration of such lands or interests in lands a map showing the portion of such lands or interests in lands which it is desired to appropriate.

(b) If within a period of four months after such filing, the Secretary of such Department shall not have certified to the Secretary that the proposed appropriation of such land or material is contrary to the public interest or inconsistent with the purposes for which such land or materials have been reserved, or shall have agreed to the appropriation and transfer under conditions which he deems necessary for the adequate protection and utilization of the reserve, then such land and materials may be appropriated and transferred to the State highway department, or its nominee, for such purposes and subject to the conditions so specified.

(c) If at any time the need for any such lands or materials for such purposes shall no longer exist, notice of the fact shall be given by the State highway department to the Secretary and such lands or materials shall immediately revert to the control of the Secretary of the Department from which they had been appropriated.

(d) The provisions of this section shall apply only to projects constructed on a Federal-aid system or under the provisions of chapter 2 of this title.

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28 U.S.C. § 2409a.

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

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43 U.S.C. §§ 270-1 and 270-3.

Sec. 1. That the secretary of the Interior is hereby authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of vacant, unappropriated, and unreserved nonmineral land in the district of Alaska, or subject to the provisions of the Act of March 8, 1922 (42 Stat. 415, 48 U.S.C. 376-377), vacant, unappropriated, and

unreserved land in Alaska that may be valuable for coal, oil, or gas deposits, to any Indian, Aleut or Eskimo of full or mixed blood who resides in and is a native of said district, and who is the head of a family, or is twenty-one years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and nontaxable until otherwise provided by Congress: *Provided*, That any Indian, Aleut, or Eskimo who receives an allotment under this Act, or his heirs, is authorized to convey by deed, with the approval of the Secretary of the Interior, the title to the land so allotted, and such conveyance shall vest in the purchaser a complete title to the land which shall be subject to restrictions against alienation and taxation only if the purchaser is an Indian, Aleut, or Eskimo native of Alaska who the Secretary determines is unable to manage the land without the protection of the United States and the conveyance provides for a continuance of such regulations. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding one hundred and sixty acres.

. . .

Sec. 3. No allotment shall be made to any person under this Act until said person has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years.

(Act of May 17, 1906, 34 Stat. 197, as amended August 2, 1956, Ch. 891, 70 Stat. 954: 43 U.S.C. §§ 270-1, 270-3

(1970), repealed with saving clause by P.L. 92-203, Dec. 18, 1971, 85 Stat. 710, 43 U.S.C. § 1617(a)).

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43 U.S.C. § 1617.

(a) No Native covered by the provisions of this chapter, and no descendant of his, may hereafter avail himself of an allotment under the provisions of the Act of February 8, 1887 (24 Stat. 389), as amended and supplemented, or the Act of June 25, 1910 (36 Stat. 363). Further, the Act of May 17, 1906 (34 Stat. 197), as amended, is hereby repealed. Notwithstanding the foregoing provisions of this section, any application for an allotment that is pending before the Department of the Interior on December 18, 1971, may, at the option of the Native applicant, be approved and a patent issued in accordance with said 1887, 1910, or 1906 Act, as the case may be, in which event the Native shall not be eligible for a patent under section 1613(h)(5) of this title.

Alaska National Interest Lands Conservation Act, Section 905(a); 43 U.S.C. § 1634(a)

(1) Subject to valid existing rights, all Alaska Native allotment applications made pursuant to the Act of May 17, 1906 (34 Stat. 197, as amended) which were pending before the Department of the Interior on or before

December 18, 1971, and which describe either land that was unreserved on December 13, 1968, or land within the National Petroleum Reserve – Alaska (then identified as Naval Petroleum Reserve No. 4) are hereby approved on the one hundred and eightieth day following the effective date of this Act, except where provided otherwise by paragraph (3), (4), (5), or (6) of this subsection, or where the land description of the allotment must be adjusted pursuant to subsection (b) of this section, in which cases approval pursuant to the terms of this subsection shall be effective at the time the adjustment becomes final. The Secretary shall cause allotments approved pursuant to this section to be surveyed and shall issue trust certificates therefor.